SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 482

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

J. HARRY WIENER

No. 483

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

J. HARRY WIENER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 [Caption omitted.]

J. H. WIENER
vs.
HARRY H. WEISS, AS COLLECTOR OF INTERNAL REVENUE OF the United States at Cleveland, Ohio } No. 12414

J. H. WEINER
vs.
C. F. ROUTZAHN, AS COLLECTOR OF INTERNAL REVENUE OF the United States at Cleveland, Ohio, also known as the Eighteenth District of Ohio } No. 12429

2 In United States District Court, Northern District of Ohio, Eastern Division

Amended petition

Filed Mar. 27, 1924 in case No. 12,414

The claimant in the above entitled cause respectfully represents to this honorable court as follows:

First. That the plaintiff made his return for income tax in the year 1919 for the calendar year ending on the 31st day of December, 1918, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute, and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business amounted to seven thousand twenty-one and 86/100 dollars ($7,021.86), that the gross amount of rents received were sixty-eight thousand twenty and 03/100 dollars ($68,020.03), that the disbursements on said rent account totaled sixty-six thousand seventeen and 52/100 dollars ($66,017.52), leaving a balance of two thousand two and 51/100 dollars ($2,002.51), or a total net income of nine thousand twenty-four and 37/100 dollars ($9,024.37).

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation on buildings standing on lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter the plaintiff made an amended return in which he claimed depreciation on buildings owned by plaintiff in the sum of twenty-one thousand six hundred fourteen and 41/100 dollars ($21,614.41) for the year 1918, and also one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows: On No. 8 South Howard Street, on which there was a building costing twenty-five thousand dollars ($25,000.00) and having a life of approximately

ten years, he claimed a depreciation of one thousand forty-one and 67/100 dollars ($1,041.67), and upon a certain building located upon leasehold premises known as 79 South Main Street, having a value of twenty-five thousand dollars ($25,000.00), with buildings having a life of fifteen years, he claimed depreciation in the
3 amount of six hundred ninety-six and 11/100 dollars ($696.11), making a total of one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78).

Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said lease, at all times to keep the building upon said premises of value equal to at least the building upon said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of said premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff a depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did, therefore, in its findings, dated the 11th day of April, 1923, find that the plaintiff was entitled to a refund of the sum of five hundred ninety-eight and 87/100 dollars ($598.87) from the tax which the plaintiff had theretofore paid to the defendant, Harry H. Weiss, in the year 1919 for said 1918 taxes in the sum of six hundred twenty-one and 65/100 dollars ($621.65), making the total tax assessable against the plaintiff for the year 1918 the sum of twenty-two and 78/100 dollars ($22.78). Plaintiff alleges that had he been allowed depreciation upon the buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever, as above stated, no tax would have been assessed against the plaintiff for the year 1918.

Second. That the plaintiff made his return for income tax in the year 1920 for the calendar year ending on the 31st day of December, 1919, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net
4 returns from his business, including rentals, amounted to eleven thousand one hundred seventy-nine and 95/100 dollars ($11,179.95) and that he received income from salaries and wages amounting to five thousand two hundred dollars ($5,200.00), making a total net income of sixteen thousand three hundred seventy-nine and 95/100 dollars ($16,379.95), from which was deductible taxes paid, amounting to one thousand dollars ($1,000.00), leaving a bal-

ance of fifteen thousand three hundred seventy-nine and 95/100 dollars ($15,379.95) as a total net income.

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation upon buildings standing on land owned by the plaintiff in fee or upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter, plaintiff filed an amended return in which he claimed depreciation on buildings owned by plaintiff in fee in the sum of twenty-one thousand four hundred thirty-five and 11/100 dollars ($21,435.11), and nine thousand one hundred forty and 07/100 dollars ($9,140.07) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows, all of said buildings being located in the city of Akron, Ohio:

Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
216 S. Main St.	$25,000.00	15 yrs.		1,111.11
48 Howard St.	20,000.00	30 yrs.		2,500.00
218 S. Main St.	25,000.00	15 yrs.		1,666.67
42 S. Howard St.	18,900.00	15 yrs.		630.00
Wiener & Freiberg leases as follows: 376 E. Market St.	15,000.00	30 yrs.	873.00	
	5,000.00	12 yrs.	208.23	
382 E. Market St.	10,000.00	6 yrs.	833.34	
102 S. Main St.	80,000.00	20 yrs.	4,450.00	
			6,464.59	
			3,252.29	3,252.29
				9,140.07

5 Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said leases, at all times to keep the building on said premises of value equal to at least the building on said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of the premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the original return for the calendar year 1919 he paid to the defendant, Harry H. Weiss, income taxes in the sum of eight hundred sixty-two and 40/100 dollars ($862.40), and thereafter on the 7th day of December, 1921, he paid to the defendant, Harry H. Weiss, an additional assessment on the original return for the calendar year 1919 in the sum of three hundred seventy-two and 80/100 dollars ($372.80) tax, and penalty in the sum of eighteen and 64/100 dollars ($18.64), making total tax and penalty of three hundred ninety-one and 44/100 dollars ($391.44), which amount, together with the original payment of eight hundred sixty-two and 40/100 dollars ($862.40), amounted to one thousand two hundred fifty-three and 84/100 dollars ($1,253.84).

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did therefore in its findings, dated the 11th day of April, 1923, find that the plaintiff was to be assessed an additional tax on one thousand twenty-four and 70/100 dollars ($1,024.70), which tax did not take into account the amount of three hundred seventy-two and 80/100 dollars ($372.80) theretofore paid by the plaintiff to the defendant, Harry H. Weiss, on the 7th day of December, 1921, as aforesaid. The method by which this tax was adjusted is hereinafter stated in paragraph fourth.

6 Plaintiff alleges that had he been allowed depreciation upon the buildings located on the premises held by plaintiff under said ninety-nine year leases, renewable forever, as above stated, that the sum of six hundred four dollars ($604.00) only would have been assessed against the plaintiff for income tax, instead of the amount above set fourth, and that by reason thereof the plaintiff would be entitled to credit on said tax accordingly as set forth in paragraph fourth of this amended petition.

Third. That the plaintiff made his return for income tax in the year 1921 for the calendar year ending on the 31st day of December, 1920, under the provisions of the Income Tax Law of the Revenue Act of 1918; that plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business, including automobile business and real estate, was twenty-nine thousand ninety-seven and 57/100 dollars ($29,097.57); that his repairs, wear and tear, obsolescence, depreciation and property losses on said buildings amounted to fifty-one thousand six hundred ninety-nine and 88/100 dollars ($51,699.88), leaving a net loss from business of twenty-one thousand five hundred ninety-two and 41/100 dollars ($21,592.41); that he had received income from salaries in the sum of five thousand two hundred dollars ($5,200.00), leaving net loss for the calendar year 1920 of sixteen thousand three hundred ninety-two and 41/100 dollars ($16,392.41).

In said income tax return the plaintiff claimed depreciation on buildings standing on lands owned by the plaintiff in fee and upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. The Department of Internal Revenue of the Treasury Department allowed to the plaintiff as depreciation on buildings owned by the plaintiff in fee simple the sum of twenty-four thousand seven hundred one and 27/100 dollars ($24,701.27), but refused to allow to the plaintiff depreciation on said buildings located

on premises held by the plaintiff under ninety-nine year leases, renewable forever. The following is a schedule of the amounts of depreciation claimed by the plaintiff on buildings located on premises held by the plaintiff under leases for the period of ninety-nine years, renewable forever:

7 Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
48 Howard St.	25,000.00	10 yrs.		2,500.00
78 S. Main St.	25,000.00	15 yrs.		1,666.67
74 S. Main St.	25,000.00	15 yrs.		1,666.67
48 Howard St.	18,900.00	15 yrs.		1,260.00
69 S. Main St.	28,000.00	25 yrs.		1,120.00
69 S. Main St.	12,700.00	15 yrs.		846.67
69 S. Main St.	7,700.00	10 yrs.		770.00
69 S. Main St.	250.00	5 yrs.		50.00
69 S. Main St.	1,500.00	10 yrs.		150.00
69 S. Main St.	2,500.00	15 yrs.		166.67
69 S. Main St.	12,000.00	33 yrs.		360.00
3-4 Voris St.	3,500.00	15 yrs.		233.45
2 Voris St.	3,500.00	15 yrs.		233.45
11 Voris St.	6,000.00	2 yrs.		3,000.00
64 S. Main St.	45,000.00	25 yrs.		1,800.00
67 S. Main St.	500.00	5 yrs.		100.00
67 S. Main St.	500.00	5 yrs.		100.00
67 S. Main St.	500.00	5 yrs.		100.00
Barberton, Ohio	34,375.00	25 yrs.		1,031.25
36 High St.	70,000.00	15 yrs.		3,111.11
Wiener & Freiberg leaseholds as follows: 378 E. Market St.	85,000.00	18 yrs.	1,940.00	
	5,000.00	12 yrs.	416.50	
382 E. Market St.	10,000.00	8 yrs.	1,250.00	
382 E. Market St.	89,000.00	20 yrs.	4,450.00	
64 S. Howard St.	14,000.00	20 yrs.	583.33	
			8,645.83	
			4,322.91	4,322.91
				24,588.85

All of the buildings above mentioned are situated upon leasehold premises in the city of Akron, county of Summit, and State of Ohio, with the exception of one building, which is above designated in the foregoing table as "Barberton, Ohio."

Plaintiff alleges that had the Internal Revenue Service of the Treasury Department allowed to the plaintiff the depreciation
8 on said buildings in the amount of twenty-four thousand five hundred eighty-eight and 85/100 dollars ($24,588.85), as above stated, the plaintiff would have had no tax assessed against him as set forth under paragraph fourth hereafter for the calendar year of 1920.

Plaintiff alleges that he was entitled to deduct depreciation for said buildings located on said leased premises under leases which are above stated, all of which were leases for the period of ninety-nine years, renewable forever, and under each of said leases the plaintiff was required and it was his duty, by virtue of the covenants in each of said leases, at all times to keep the buildings equal to at least the value of the buildings which were located on said premises at the time the said leases were made, which value was as stated in the

foregoing table. Plaintiff alleges that he, and not the owner in fee simple of said premises, suffered the depreciation upon the buildings located upon said leased premises. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated.

Fourth. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States did find under the facts above set forth that the plaintiff had been overassessed for the year 1918 the sum of five hundred ninety-eight and 87/100 dollars ($598.87), but that for the year 1919 was subject to an additional tax in the amount of one thousand twenty-four and 70/100 dollars ($1,024.70), and for the year 1920 an additional tax of three hundred fifty-six and 06/100 dollars ($356.06), making total additional taxes for the years 1919 and 1920 of one thousand three hundred eighty and 76/100 dollars ($1,380.76). Deducting from said additional tax the overassessment of 1918 of five hundred ninety-eight and 87/100 dollars ($598.87) left a net additional tax of seven hundred eighty-one and 89/100 dollars ($781.89). Thereafter the Internal Revenue Service of the Treasury Department allowed to the plaintiff as a credit the amount which he had
9 paid as aforesaid under paragraph second of this amended petition, on the 7th day of December, 1921, in the sum of three hundred seventy-two and 80/100 dollars ($372.80), but C. F. Routzahn, who was then the duly appointed, acting, and qualified collector of internal revenue at Cleveland, Ohio, did demand payment from the plaintiff of the sum of four hundred nine and 09/100 dollars ($409.09) as the balance of said additional tax so assessed, remaining.

Fifth. Thereupon, following the report of the Internal Revenue Service of the Treasury Department, bearing date the 11th day of April, 1923, but mailed at Cleveland, Ohio, on the 16th day of April, 1923, the plaintiff did thereupon duly file his appeal in the office of the Commissioner of Internal Revenue in the Treasury Department in Washington, D. C., and thereafter a conference was duly held concerning the additional tax liability claimed by the Commissioner of Internal Revenue from the plaintiff as set forth in the last preceding paragraph, and concerning the amount claimed by the plaintiff which should be refunded to the plaintiff. Thereafter, namely, on the 13th day of July, 1923, the Income Tax Unit having heard the said appeal, did render its decision through the Commissioner of Internal Revenue concerning the income tax returns of the plaintiff for the years 1918 to 1920, inclusive, and with especial reference to the said report of the internal revenue agent in

charge of Cleveland, Ohio, dated the 11th day of April, 1923, and mailed the 16th day of April, 1923, and referred to in the decision of the Commissioner of Internal Revenue as dated April 4th, 1923. In said decision of July 13th, 1923, the said Commissioner of Internal Revenue did find that, as stated in the last preceding paragraph, there was claimed to be due from the plaintiff as additional income tax, based on the income tax returns of plaintiff for the years 1918, 1919, and 1920, in the sum of four hundred nine and 09/100 dollars ($409.09), as shown in the statement below:

1918	Over-assessment		598.87
1919	Additional tax	651.90	
1920	Additional tax	356.06	
		1,007.96	598.87
	Net additional tax		409.09

10 In said decision the Income Tax Unit did further state that the claim of the plaintiff to deduct depreciation on buildings located on premises held by plaintiff under ninety-nine year leases was rejected. Thereupon, the plaintiff, on the 8th day of August, 1923, did file his appeal from the decision of the Income Tax Unit in the offices of the Commissioner of Internal Revenue, Treasury Department, and thereupon the Commissioner of Internal Revenue did set the said appeal for hearing on the 29th day of August, 1923. On the 29th day of August, 1923, the said appeal was heard before the committee on appeals in the Treasury Department at Washington, D. C., and said committee and the said Commissioner of Internal Revenue, after hearing said appeal, did sustain the Income Tax Unit in its decision and did find that the plaintiff was not entitled to deduct from his income depreciation on buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever.

Sixth. Plaintiff alleges that he paid to the said C. F. Routzahn, as said collector, the sum of four hundred nine and 09/100 dollars ($409.09) on the 12th day of January, 1924, which amount, however, plaintiff paid to said C. F. Routzahn under protest. Plaintiff alleges that he paid said amount of four hundred nine and 09/100 dollars ($409.09) to the said C. F. Routzahn, as said collector, under duress and compulsion and in an involuntary manner, and by reason solely of the fact that the said C. F. Routzahn, as collector, threatened that he would proceed against the property of the plaintiff unless the plaintiff paid to the said C. F. Routzahn, as collector, the sum of four hundred nine and 09/100 dollars ($409.09), as above set forth.

Seventh. At the same time that the said plaintiff paid the sum of four hundred and 09/100 dollars ($409.09), he filed two claims for abatement of tax assessed with said C. F. Routzahn, as collector, one for the year 1919, in which claim for abatement plaintiff claimed that he had paid taxes for the year 1919 in the amount of one thousand two hundred thirty-five and 20/100 dollars; that there was

due for the year 1919 only the sum of six hundred four dollars ($604.00), which would leave a balance due plaintiff of six hundred thirty-one and 20/100 dollars ($631.20) for the year 1920.

11 The claim for abatement for the year 1920 set forth that plaintiff owed no tax liability for that year and denied the claim of the Commissioner of Internal Revenue for the additional tax for the year 1920 of three hundred fifty-six and 06/100 dollars ($356.06); that after an examination of said claim for abatement, the Commissioner of Internal Revenue rejected the same.

Eighth. That subsequently, on the 9th day of February, 1924, the plaintiff filed with said C. F. Routzahn, collector, three claims for refund of taxes illegally collected—one for the year 1918, in which he made claim for the entire amount of six hundred twenty-one and 65/100 dollars ($621.65), paid as income tax in the year 1918, one for the sum of six hundred thirty-one and 20/100 dollars ($631.20), which is the sum paid by plaintiff in excess of the sum of six hundred four dollars ($604.00), which, as the plaintiff claims, is his tax liability for the year 1919, and one for the refund of three hundred fifty-six and 06/100 dollars ($356.06), which is a part of the four hundred nine and 09/100 dollars ($409.09), paid to the said C. F. Routzahn as collector, on the 12th day of January, 1924.

Ninth. That after consideration of said claim for refund the Commissioner of Internal Revenue of the United States rejected said claim and the said C. F. Routzahn was instructed to notify the said plaintiff of the rejection of said claim.

Tenth. Plaintiff therefore claims from the defendant, Harry H. Weiss, as collector, the sum of six hundred thirty-one and 20/100 dollars ($631.20), as amount of overpayment as aforesaid made by plaintiff to the defendant, Harry H. Weiss, collector, in the year 1919, making the total amount from said Harry H. Weiss of one thousand two hundred fifty-two and 85/100 dollars ($1,252.85).

Wherefore, plaintiff prays judgment against the defendant, Harry H. Weiss, collector, in the sum of one thousand two hundred fifty-two and 85/100 dollars ($1,252.85), as aforesaid; the plaintiff further averring that he has always been the sole owner of the claims hereinbefore referred to and has not assigned nor transferred the whole or any part thereof, or any interest therein, and that he has at all times borne allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or

12 given encouragement to rebellion against the said Government; and that he believes the matters as stated herein to be true, and that he is justly entitled to the said amount from the United States, after allowing all its just debts and offsets.

J. H. WIENER,
By COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys.

[*Duly sworn to by J. H. Wiener; jurat omitted in printing.*]

In United States District Court

Precipe for summons

Filed March 27, 1924

To the Clerk:

Issue summons in the above-entitled action for the defendant, Harry H. Weiss, as collector of internal revenue, at Cleveland, Ohio, to be marshalled for the Northern District of Ohio, Eastern Division of the United States District Court, returnable according to law.

Endorse thereon: "Claim for money, amount claimed against said Harry H. Weiss, collector, one thousand two hundred fifty-two and 85/100 dollars ($1,252.85)."

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.

13 In United States District Court

Waiver of trial to jury

Filed Nov. 12, 1926, in case No. 12414

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.
A. E. BERNSTEEN, *Attorney for Defendant.*

In United States District Court

Answer to amended petition

Filed Dec. 7, 1926, in case No. 12414

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and files this answer on behalf of Harry Weiss, and says:

1. Defendant admits that the plaintiff filed his income tax return in the year 1919 for the calendar year ending December 31, 1918, and admits that the plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute. Defendant admits that the plaintiff failed to claim depreciation on buildings standing on lands which were held by plaintiff under 99-year leases, which were renewable forever. Defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation upon buildings owned by plaintiff in fee simple when plaintiff had a capital investment in said buildings, but refused to allow to plaintiff depreciation on buildings located on premises leased by the plaintiff under leases for 99 years renewable forever, except to the extent that

plaintiff had a capital investment in said leases. Defendant denies each and every allegation in paragraph "first" not expressly herein admitted.

14 2. Defendant admits that the plaintiff made a return for the income tax in the year 1920 for the calendar year ending December 31, 1919. Defendant admits that the plaintiff did not take depreciation in the said return upon buildings standing upon lands which were held by the plaintiff under 99-year leases renewable forever. Defendant further admits that the Commissioner of Internal Revenue allowed to the plaintiff depreciation upon the buildings owned by the plaintiff in fee simple to the extent of his capital investment therein, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for a period of 99 years renewable forever, except to the extent of plaintiff's capital investment therein. Defendant denies each and every allegation in paragraph "second" not herein expressly admitted.

3. Defendant admits that the plaintiff made a return for income tax in the year 1921 for the calendar year ending December 31, 1920. Defendant admits that in said return the plaintiff claimed depreciation upon buildings standing on lands owned by the plaintiff in fee and on lands which were held by the plaintiff under 99-year leases renewable forever. This defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation on buildings owned by the plaintiff in fee simple on his capital investment therein, but refused to allow to the plaintiff depreciation on buildings located on premises held by the plaintiff under leases for a period of 99 years, renewable forever, except to the extent of plaintiff's capital investment therein. This defendant denies each and every allegation in paragraph "third" not herein expressly admitted to be true.

4. This defendant admits the allegations of paragraph "fourth."

5. This defendant admits the allegations of paragraph "fifth."

6. Answering paragraph 6, this defendant admits plaintiff paid to C. F. Routzahn as collector the sum of four hundred nine dollars and nine cents ($409.09) under protest. This defendant denies each and every allegation in paragraph "sixth" not herein expressly admitted.

7. This defendant admits the allegations of paragraph "seventh."

15 8. This defendant admits the allegations of paragraph "eighth."

9. This defendant admits the allegations of paragraph "ninth."

10. This defendant denies each and every allegation in paragraph "tenth."

Wherefore this answering defendant prays that the action instituted against him by the plaintiff may be dismissed and that the plaintiff pay the costs herein.

A. E. BERNSTEIN,
United States Attorney.

[*Duly sworn to by A. E. Bernstein; jurat omitted in printing.*]

In United States District Court

Stipulation re filing of answer

Filed Jan. 5, 1927, in case No. 12,414

It is hereby stipulated that the answer in the above-entitled case may be filed as of the 7th day of December, A. D. 1926.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

16 In United States District Court

Order granting leave to file answer to amended petition as of Dec. 7, 1926

Entered Jan. 5, 1927, case No. 12,414

On application of defendant and consent of plaintiff, leave is hereby given defendant to file his answer to amended petition as of December 7, 1926, and said answer to amended petition is accordingly filed as of December 7, 1926.

In United States District Court

Judgment for defendant

Jan. 8, 1927, case No. 12,414

This matter came on to be heard before the court, the attorneys for the plaintiff and attorneys for defendant having waived in writing trial by jury herein and having consented that this cause be heard and determined by the court without the intervention of a jury, on the pleadings and agreed statement of facts which was heretofore filed in this cause.

Upon consideration thereof, the court finds upon said issues joined for the defendant and against plaintiff, to which ruling of court the plaintiff, by his attorneys, excepts.

It is, therefore, considered and adjudged by the court that the said defendant recover of plaintiff his costs herein expended taxed at ——— and that the plaintiff pay his own costs.

17 In United States District Court

Motion for new trial

Filed Jan. 8, 1927, in case No. 12,414

Now comes plaintiff by his attorneys and respectfully moves the court for a new trial in the within action, for the reasons hereinafter set forth in the attached brief.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

Jan. 8, 1927, case No. 12,414

This day this cause came on to be heard upon motion of the plaintiff for a new trial and was submitted to the court. Upon consideration thereof, the court overrules said motion, to which ruling of the court plaintiff, by his attorneys, excepts.

It is further ordered by the court that the plaintiff have fifty (50) days in which to prepare, settle and file his bill of exceptions in accord with general rule 38.

18 In United States District Court

Petition

Filed March 27, 1924, in case No. 12,429

The claimant in the above entitled cause respectfully represents to this honorable court as follows:

First. That the plaintiff made his return for income tax in the year 1919 for the calendar year ending on the 31st day of December, 1918, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute, and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business amounted to seven thousand twenty-one and 86/100 dollars ($7,021.86), that the gross amount of rents received were sixty-eight thousand twenty and 03/100 dollars ($68,020.03), that the disbursements on said rent account totaled sixty-six thousand seventeen and 52/100 dollars ($66,017.52), leaving a balance of two thousand two and 51/100 dollars ($2,002.51), or a total net income of nine thousand twenty-four and 37/100 dollars ($9,024.37).

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation on buildings standing on lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter the plaintiff made an amended return in which he claimed depreciation on buildings owned by plaintiff in the sum of twenty-one thousand six hundred fourteen and 41/100 dollars ($21,614.41) for the year 1918, and also one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows: On No. 8 South Howard Street, on which there was a building costing twenty-five thousand dollars ($25,000.00) and having a life of approximately ten years, he claimed a depreciation of one thousand forty-one 67/100 dollars

($1,041.67), and upon a certain building located upon leasehold premises known as 79 South Main Street, having a value of twenty-five thousand dollars ($25,000.00), with buildings having a life of fifteen years, he claimed depreciation in the amount of six hundred ninety-six and 11/100 dollars ($696.11), making a total
19 of one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78).

Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said lease, at all times to keep the building upon said premises of value equal to at least the building upon said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of said premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff a depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did, therefore, in its findings, dated the 11th day of April, 1923, find that the plaintiff was entitled to a refund of the sum of five hundred ninety-eight and 87/100 dollars ($598.87) from the tax which the plaintiff had theretofore paid to Harry H. Weiss, who was then the duly appointed, acting, and qualified collector of internal revenue at Cleveland, Ohio, in the year 1919 for said 1918 taxes in the sum of six hundred twenty-one and 65/100 dollars ($621.65), making the total tax assessable against the plaintiff for the year 1918 the sum of twenty-two and 78/100 dollars ($22.78). Plaintiff alleges that had he been allowed depreciation upon the buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever, as above stated, no tax would have been assessed against the plaintiff for the year 1918.

Second. That the plaintiff made his return for income tax in the year 1920 for the calendar year ending on the 31st day of December, 1919, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net
20 returns from his business, including rentals, amounted to eleven thousand one hundred seventy-nine and 95/100 dollars ($11,179.95) and that he received income from salaries and wages amounting to five thousand two hundred dollars ($5,200.00), making a total net income of sixteen thousand three hundred seventy-nine and 95/100 dollars ($16,379.95), from which was deductible taxes

paid, amounting to one thousand dollars ($1,000.00), leaving a balance of fifteen thousand three hundred seventy-nine and 95/100 dollars ($15,379.95) as a total net income.

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation upon buildings standing on lands owned by the plaintiff in fee or upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter, plaintiff filed an amended return in which he claimed depreciation on buildings owned by plaintiff in fee in the sum of twenty-one thousand four hundred thirty-five and 11/100 dollars ($21,435.11), and nine thousand one hundred forty and 07/100 dollars ($9,140.07) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows, all of said buildings being located in the city of Akron, Ohio:

Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
77 S. Main St.	$25,000.00	15 yrs.	--	1,111.11
8 S. Howard St.	35,000.00	30 yrs.		2,500.00
79 S. Main St.	25,000.00	15 yrs.		1,666.67
42 S. Howard St.	18,000.00	15 yrs.		936.00
Wiener & Freiberg leases as follows: 376 E. Market St.	35,000.00	19 yrs.	973.68	
	5,000.00	12 yrs.	208.33	
380 E. Market St.	10,000.00	8 yrs.	833.34	
102 S. Main St.	80,000.00	20 yrs.	4,456.00	
			6,464.59	
			3,252.29	3,252.29
				9,140.07

Plaintiff alleges that under each of the leases for the term
21 of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said leases, at all times to keep the building on said premises of value equal to at least the building on said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of the premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the original return for the calendar year 1919 he paid to the said Harry H. Weiss as such collector, income taxes in the sum of eight hundred sixty-two and 40/100 dollars ($862.40), and thereafter on the 7th day of December, 1921, he paid to the said Harry H. Weiss as collector, an additional assessment on the original return for the calendar year 1919 in the sum of three hundred seventy-two and 80/100 dollars ($372.80) tax, and penalty in the sum of eighteen and 64/100 dollars ($18.64), making a total tax and penalty of three hundred and ninety-one and 44/100 dollars ($391.44), which amount, together with the original payment of eight hundred sixty-two and 40/100 dollars ($862.40),

amounted to one thousand two hundred fifty-three and 84/100 dollars ($1,253.84).

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did therefore in its findings, dated the 11th day of April, 1923, find that the plaintiff was to be assessed an additional tax of one thousand twenty-four and 70/100 dollars ($1,024.70), which tax did not take into account the amount of three hundred seventy-two and 80/100 dollars ($372.80) theretofore paid by the plaintiff to the said Harry H. Weiss, as collector, on the 7th day of December, 1921, as aforesaid. The method by which this tax was adjusted is hereinafter stated in paragraph fourth.

Plaintiff alleges that had he been allowed depreciation upon the buildings located on the premises held by plaintiff under said ninety-nine year leases renewable forever as above stated, that the sum of six hundred four dollars ($604.00) only would have been assessed against the plaintiff for income tax, instead of the amount above set forth, and that by reason thereof the plaintiff would be entitled to credit on said tax accordingly as set forth in paragraph fourth of this petition.

Third. That the plaintiff made his returns for income tax in the year 1921 for the calendar year ending on the 31st day of December, 1920, under the provisions of the income tax law of the revenue act of 1918; that plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business, including automobile business and real estate, was twenty-nine thousand ninety-seven and 57/100 dollars ($29,097.57); that his repairs, wear and tear, obsolescence, depreciation, and property losses on said buildings amounted to fifty-one thousand six hundred ninety-nine and 88/100 dollars ($51,699.88), leaving a net loss from business of twenty-one thousand five hundred ninety-two and 41/100 dollars ($21,592.41); that he had received income from salaries in the sum of five thousand two hundred dollars ($5,200.00), leaving net loss for the calendar year 1920 of sixteen thousand three hundred ninety-two and 41/100 dollars ($16,392.41).

In said income-tax return the plaintiff claimed depreciation on buildings standing on lands owned by the plaintiff in fee and upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. The Department of Internal Revenue of the Treasury Department allowed to the plaintiff as depreciation on

buildings owned by the plaintiff in fee simple the sum of twenty-four thousand seven hundred one and 27/100 dollars ($24,701.27), but refused to allow to the plaintiff depreciation on said buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever. The following is a schedule of the amounts of depreciation claimed by the plaintiff on buildings located on premises held by the plaintiff under leases for the period of ninety-nine years, renewable forever.

25 Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (Depreciation)	Bldgs. on 99-year leases (Depreciation)
8 S. Howard St	25,000 00	10 yrs		2,500 00
70 S. Main St	25,000 00	15 yrs		1,666 67
77 S. Main St	25,000 00	15 yrs		1,666 67
42 S. Howard St	18,000 00	15 yrs		1,200 00
810 S. Main St	28,000 00	25 yrs		1,120 00
819 S. Main St	12,000 00	15 yrs		800 00
819 S. Main St	7,000 00	10 yrs		700 00
819 S. Main St	2,500 00	5 yrs		500 00
819 S. Main St	1,500 00	10 yrs		150 00
819 S. Main St	2,500 00	15 yrs		166 67
20-3 Voris St	12,000 00	33 yrs		363 63
19 Voris St	5,000 00	15 yrs		333 33
17 Voris St	5,000 00	15 yrs		333 33
614 S. Main St	5,000 00	5 yrs		1,000 00
479 S. Main St	85,000 00	20 yrs		4,250 00
479 S. Main St	1,000 00	5 yrs		200 00
479 S. Main St	500 00	5 yrs		100 00
479 S. Main St	500 00	5 yrs		100 00
Barberton, Ohio	34,875 00	20 yrs		1,743 75
20 High St	70,000 00	15 yrs		4,666 67
26 over 4 Freiberg leaseholds as follows: 178 E. Market St	35,000 00	18 yrs	1,940 00	3,111 11
	3,000 00	12 yrs	816 30	
282 E. Market St	15,000 00	5 yrs	3,302 30	20,264 94
192 E. Market St	80,000 00	20 yrs	1,276 00	
69 S. Howard St	18,000 00	20 yrs	4,446 00	
			203 33	
			8,641 93	
			4,322 91	4,322 91
				24,589 85

All of the buildings above mentioned are situated upon leasehold premises in the city of Akron, county of Summit, and State of Ohio, with the exception of one building, which is above designated in the foregoing table as "Barberton, Ohio."

Plaintiff alleges that had the Internal Revenue Service of
24 the Treasury Department allowed to the plaintiff the depreciation on said buildings in the amount of twenty-four thousand five hundred eighty-eight and 85/100 dollars ($24,588.85), as above stated, the plaintiff would have had no tax assessed against him as set forth under paragraph fourth hereafter, for the calendar year of 1920.

Plaintiff alleges that he was entitled to deduct depreciation for said buildings located on said leased premises under leases which are above stated, all of which were leases for the period of ninety-nine years, renewable forever, and under each of said leases the plaintiff was required and it was his duty, by virtue of the covenants in each

of said leases, at all times to keep the buildings equal to at least the value of the buildings which were located on said premises at the time the said leases were made, which value was as stated in the foregoing table. Plaintiff alleges that he, and not the owner in fee simple of said premises, suffered the depreciation upon the buildings located upon said leased premises. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated.

Fourth: Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States did find under the facts above set forth that the plaintiff had been overassessed for the year 1918 the sum of five hundred ninety-eight and 87/100 dollars ($598.87), but that for the year 1919 was subject to an additional tax in the amount of one thousand twenty-four and 70/100 dollars ($1,024.70), and for the year 1920, an additional tax of three hundred fifty-six and 06/100 dollars ($356.06), making total additional taxes for the years 1919 and 1920 of one thousand three hundred eighty and 76/100 dollars ($1,380.76). Deducting from said additional tax the overassessment of 1918 of five hundred ninety-eight and 87/100 dollars ($598.87), left a net additional tax of seven hundred eight-one and 89/100 dollars ($781.89). Thereafter the Internal Revenue Service of the Treasury Department allowed to the plaintiff as a credit the amount which he had paid as aforesaid under paragraph second of this petition, on the 7th day of December, 1921, in the sum of three hundred seventy-two and 80/100 dollars ($372.80), but the defendant, C. F. Routzahn, as commissioner, did demand payment from the plaintiff of the sum of four hundred nine and 09/100 dollars ($409.09) as the balance of said additional tax so assessed, remaining.

Fifth. Thereupon, following the report of the Internal Revenue Service of the Treasury Department, bearing date the 11th day of April, 1923, but mailed at Cleveland, Ohio, on the 16th day of April, 1923, the plaintiff did thereupon duly file his appeal in the office of the Commissioner of Internal Revenue in the Treasury Department in Washington, D. C., and thereafter a conference was duly held concerning the additional tax liability claimed by the Commissioner of Internal Revenue from the plaintiff as set forth in the last preceding paragraph, and concerning the amount claimed by the plaintiff which should be refunded to the plaintiff. Thereafter, namely, on the 13th day of July, 1923, the Income Tax Unit, having heard the said appeal, did render its decision through the Commissioner of Internal Revenue concerning the income tax returns of the plaintiff for the years 1918 to 1920, inclusive, and with especial

reference to the said report of the internal revenue agent in charge of Cleveland, Ohio, dated the 11th day of April, 1923, and mailed the 16th day of April, 1923, and referred to in the decision of the Commissioner of Internal Revenue as dated April 4th, 1923. In said decision of July 13th, 1923, the said Commissioner of Internal Revenue did find that, as stated in the last preceding paragraph, there was claimed to be due from the plaintiff as additional income tax, based on the income tax returns of plaintiff for the years 1918, 1919, and 1920, in the sum of four hundred nine and 09/100 dollars ($409.09), as shown in the statement below:

1918.	Over-assessment		598 87
1919.	Additional tax	651 80	
1920.	Additional tax	356 06	
		1,007 86	
	Net additional tax		598 87 409 09

26 In said decision the Income Tax Unit did further state that the claim of the plaintiff to deduct depreciation on buildings located on premises held by plaintiff under ninety-nine year leases was rejected. Thereupon the plaintiff, on the 8th day of August, 1923, did file his appeal from the decision of the Income Tax Unit in the offices of the Commissioner of Internal Revenue, Treasury Department, and thereupon the Commissioner of Internal Revenue did set the said appeal for hearing on the 29th day of August, 1923. On the 29th day of August, 1923, the said appeal was heard before the committee on appeals in the Treasury Department at Washington, D. C., and said committee and the said Commissioner of Internal Revenue, after hearing said appeal, did sustain the Income Tax Unit in its decision and did find that the plaintiff was not entitled to deduct from his income depreciation on buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever.

Sixth. Plaintiff alleges that he paid to the defendant, C. F. Routzahn, the sum of four hundred nine and 09/100 dollars ($409.09) on the 12th day of January, 1924, which amount, however, plaintiff paid to the defendant, Routzahn, under protest. Plaintiff alleges that he paid said amount of four hundred nine and 09/100 dollars ($409.09) to the defendant, Routzahn, under duress and compulsion and in an involuntary manner, and by reason solely of the fact that the said defendant, Routzahn, threatened that he would proceed against the property of the plaintiff unless the plaintiff paid to the said defendant, Routzahn, the sum of four hundred nine and 09/100 dollars ($409.09), as above set forth.

Seventh. At the same time that the said plaintiff paid the sum of four hundred nine and 09/100 dollars ($409.09), he filed two claims for abatement of tax assessed with defendant, C. F. Routzahn, collector, one for the year 1919, in which claim for abatement plaintiff

claimed that he had paid taxes for the year 1919 in the amount of one thousand two hundred thirty-five and 20/100 dollars ($1,235.20); that there was due for the year 1919 only the sum of six hundred four dollars ($604.00), which would leave a balance due plaintiff of six hundred thirty-one and 20/100 dollars ($631.20) for the year 1920. The claim for abatement for the year 1920 set forth that plaintiff owed no tax liability for that year and denied the claim of the Commissioner of Internal Revenue for the additional tax for the year 1920 of three hundred fifty-six and 06/100 dollars ($356.06); that after an examination of said claim for abatement the Commissioner of Internal Revenue rejected the same.

Eighth. That subsequently, on the 9th day of February, 1924, the plaintiff filed with said defendant, C. F. Routzahn, collector, three claims for refund of taxes illegally collected—one for the year 1918, in which he made claim for the entire amount of six hundred twenty-one and 65/100 dollars ($621.65) paid as income tax in the year 1918, one for the sum of six hundred thirty-one and 20/100 dollars ($631.20), which is the sum paid by plaintiff in excess of the sum of six hundred four dollars ($604.00) which, as the plaintiff claims, is his tax liability for the year 1919, and one for the refund of three hundred fifty-six and 06/100 dollars ($356.06) which is a part of the four hundred nine and 09/100 dollars ($409.09) paid to the said defendant, C. F. Routzahn, on the 12th day of January, 1924.

Ninth. That after consideration of said claim for refund the Commissioner of Internal Revenue of the United States rejected said claim and the said C. F. Routzahn was instructed to notify the said plaintiff of the rejection of said claim.

Tenth. Plaintiff therefore claims from the defendant, C. F. Routzahn, collector, the sum of four hundred nine and 09/100 dollars ($409.09) paid to the said defendant, C. F. Routzahn, on the 12th day of January, 1924, under protest, as aforesaid, which tax is the additional tax assessed against the plaintiff.

Wherefore, plaintiff prays judgment against the defendant, C. F. Routzahn, collector, in the sum of four hundred nine and 09/100 dollars ($409.09), the plaintiff further averring that he has always been the sole owner of the claims hereinbefore referred to and has not assigned nor transferred the whole or any part thereof, or any interest therein, and that he has at all times borne allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that he believes the matters as stated herein to be true, and that he is justly entitled to the said amount from the United States, after allowing all its just debts and offsets.

J. H. WIENER,
By COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys.

[*Duly sworn to by J. H. Weiner; jurat omitted in printing.*]

In United States District Court

Precipe for summons

To the clerk:

Issue summons in the above-entitled action for the defendant, C. F. Routzahn, collector of internal revenue, at Cleveland, Ohio, to be marshalled for the Northern District of Ohio, Eastern Division of the United States District Court, returnable according to law.

Indorse thereon: "Claim for money, amount claimed against said C. F. Routzahn, collector, four hundred nine and 09/100 dollars ($409.09)."

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

29 In United States District Court

Waiver of trial to jury

Filed Nov. 12, 1926, in case No. 12429

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

A. E. BERNSTEEN,
Attorney for Defendant.

In United States District Court

Answer to petition

Filed Dec. 7, 1926, in case No. 12429

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and files this answer on behalf of C. F. Routzahn, and says:

1. Defendant admits that the plaintiff filed his income tax return in the year 1919 for the calendar year ending December 31st, 1918, and admits that the plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute. Defendant admits that the plaintiff failed to claim depreciation on buildings standing on lands which were held by plaintiff under 99 year leases, which were renewable forever. Defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation upon buildings owned by plaintiff in fee simple when plaintiff had a capital investment in said buildings, but refused to allow to plaintiff depreciation on buildings located on premises leased by the plaintiff under leases for 99 years renewable forever, except to the extent that plaintiff had a capital investment in said leases. Defendant denies

each and every allegation in paragraph "first" not expressly herein admitted.

30 2. Defendant admits that the plaintiff made a return for the income tax in the year 1920 for the calendar year ending December 31, 1919. Defendant admits that the plaintiff did not take depreciation in the said return upon buildings standing upon lands which were held by the plaintiff under 99 year leases renewable forever. Defendant further admits that the Commissioner of Internal Revenue allowed to the plaintiff depreciation upon the buildings owned by the plaintiff in fee simple to the extent of his capital investment therein, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for a period of 99 years renewable forever, except to the extent of plaintiff's capital investment therein. Defendant denies each and every allegation in paragraph "second" not herein expressly admitted.

3. Defendant admits that the plaintiff made a return for income tax in the year 1921 for the calendar year ending December 31, 1920. Defendant admits that in said return the plaintiff claimed depreciation upon buildings standing on lands owned by the plaintiff in fee and on lands which were held by the plaintiff under 99 year leases renewable forever. This defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation on buildings owned by the plaintiff in fee simple on his capital investment therein, but refused to allow to the plaintiff depreciation on buildings located on premises held by the plaintiff under leases for a period of 99 years, renewable forever, except to the extent of plaintiff's capital investment therein. This defendant denies each and every allegation in paragraph "third" not herein expressly admitted to be true.

4. This defendant admits the allegations of paragraph "fourth."

5. This defendant admits the allegations of paragraph "fifth."

6. Answering paragraph 6 this defendant admits plaintiff paid to C. F. Routzahn as collector the sum of four hundred nine dollars and nine cents ($409.09) under protest. This defendant denies each and every allegation in paragraph "sixth" not herein expressly admitted.

7. This defendant admits the allegations of paragraph "seventh."

8. This defendant admits the allegations of paragraph "eighth."

31 9. This defendant admits the allegations of paragraph "ninth."

10. This defendant denies each and every allegation in paragraph "tenth."

Wherefore this answering defendant prays that the action instituted against him by the plaintiff may be dismissed and that the plaintiff pay the costs herein.

A. E. BERNSTEEN,
United States Attorney.

[*Duly sworn to by A. E. Bernsteen; jurat omitted in printing.*]

In United States District Court

Stipulation, re filing of answer

Filed Jan. 15, 1927, in case No. 12,429

It is hereby stipulated that the answer in the above-entitled cas may be filed as of the 7th day of December, A. D. 1926.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

32 In United States District Court

Order granting leave to file answer to amended petition as of Dec. 7, 1926

Entered Jan. 5, 1927, in case No. 12429

On application of defendant and consent of plaintiff, leave is hereby given defendant to file his answer to amended petition as of December 7, 1926, and said answer to amended petition is accordingly filed as of December 7, 1926.

In United States District Court

Judgment for defendant

Jan. 8, 1927, case No. 12429

This matter came on to be heard before the court, the attorneys for the plaintiff and attorneys for defendant having waived in writing trial by jury herein and having consented that this cause be heard and determined by the court without the intervention of a jury, on the pleadings and agreed statement of facts which was heretofore filed in this cause.

Upon consideration thereof, the court finds upon said issues joined for the defendant and against plaintiff, to which ruling of court the plaintiff, by his attorneys, excepts.

It is, therefore, considered and adjudged by the court that the said defendant recover of plaintiff his costs herein expended taxed at ..... and that the plaintiff pay his own costs.

33 In United States District Court

Motion for new trial

Filed Jan. 8, 1927, in case No. 12,429

Now comes plaintiff by his attorneys and respectfully moves the court for a new trial in the within action, for the reasons hereinafter set forth in the attached Brief.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

Jan. 8, 1927, case No. 12,429

This day this cause came on to be heard upon motion of the plaintiff for a new trial and was submitted to the court. Upon consideration thereof, the court overrules said motion, to which ruling of the court plaintiff, by his attorneys, excepts.

It is further ordered by the court that the plaintiff have fifty (50) days in which to prepare, settle and file his bill of exceptions in accord with general rule 38.

34 In United States District Court

Motion for judgment on record and stipulation of facts

Filed Nov. 12, 1926, in Cases Nos. 12,414 and 12,429

Defendant moves that judgment be rendered herein for the defendant on the record and stipulation of facts in the cause.

A. E. BERNSTEEN,
U. S. Atty., Attorney for Defendants.

In United States District Court

Request for findings of fact

Filed Nov. 12, 1926, in Cases Nos. 12,414 and 12,429

Defendant requests the court to make the following findings of fact:

1. That the properties involved herein were not used in plaintiff's trade or business.

2. That the plaintiff had no investment or capital in the properties involved herein.

A. E. BERNSTEEN,
U. S. Atty., Attorney for Defendants.

In United States District Court

Stipulation as to lease of properties

Filed Nov. 12, 1926, in cases Nos. 12,414 and 12,429

It is further stipulated that all of the properties herein were leased by the plaintiff to various parties, each of which sub-lessees used the said property for business purposes, in which business the plaintiff was not interested.

A. E. BERNSTEEN, *U. S. Atty.*
COMMINS, BROUSE, ENGLEBECK & MCDOWELL.

35 In United States District Court

Stipulation of facts

Filed Nov. 12, 1926, in cases Nos. 12,414 and 12,429

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts are correct and true and may be found by the court as facts in the case, subject, however, to any objection as to their relevancy, competency, or materiality to the issue as may be raised by either party at the trial and argument of this case. Either party may introduce further evidence in the cause.

I

Plaintiff for the years 1918, 1919, and 1920 filed his income tax returns as required by law with the collector of internal revenue in office at the time for the 18th District of Ohio.

II

Thereafter, the Commissioner of Internal Revenue assessed additional taxes against the said plaintiff for each of the said years.

A part of plaintiff's income was derived from rent received from properties located in the city of Akron, Ohio, which properties consisted of buildings on land held by plaintiff under 99-year leases, renewable forever. In all the properties held by the plaintiff under the 99-year leases, renewable forever, the buildings were erected and paid for by the lessors.

III

The revenue act of 1918, section 214 (a) (8) provides: "That in deducting net income there shall be allowed as deductions a reasonable allowance for exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Plaintiff claimed deductions for exhaustion, wear, and tear of buildings upon land held by him under leases for 99 years, renewable forever.

The Income Tax Unit, under the Commissioner of Internal Revenue, allowed no deductions for exhaustion, wear, and tear of buildings upon land held by him under leases for 99 years, renewable forever.

36 IV

Appeal was taken by the plaintiff to the committee on appeals and review from the decision of the unit, which committee considered the appeal and sustained the action of the commissioner in disallowing plaintiff's claim for exhaustion, wear, and tear of buildings upon land held under 99-year leases and renewable forever.

V

Thereafter, plaintiff duly made payments of the additional taxes assessed against him by the commissioner, payments being made, some to C. F. Routzahn, as collector, and some to Harry H. Weiss, as collector.

VI

Thereafter, claim for refund for the amounts so paid was duly filed and thereafter duly rejected by the Commissioner of Internal Revenue.

VII

It is agreed that if the court shall find that the plaintiff is entitled to deductions under the terms of the revenue act of 1918 for exhaustion, wear, and tear of buildings upon land held under leases for 99 years, renewable forever, the amounts to be refunded to the plaintiff are as follows:

For 1918	$22.78
For 1919	1,283.10
For 1920	356.06

If the court shall find that plaintiff is entitled to judgment, judgment shall be rendered against C. F. Routzahn as collector in the sum of $409.09 with interest, and against Harry H. Weiss as collector for the sum of $1,252.85 with interest.

VIII

The leases referred to as being for 99 years, renewable forever, were thirteen in number and the material points in the said leases are as set forth in Exhibit A hereof.

IX

There is attached hereto as Exhibit B a sample form of the
37 said leases, which may be considered as typical of all the leases subject to the changes and modifications as shown in Exhibit A hereof.

X

The Commissioner of Internal Revenue allowed the plaintiff's claim for exhaustion, wear, and tear of buildings, when such buildings were erected by or paid for by the plaintiff. And also allowed plaintiff to deduct as business expenses all sums spent as repairs on all buildings which were rented by plaintiff.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
For Plaintiff.

A. E. BERNSTEEN, *U. S. Atty.*

Exhibit A to stipulation

Recitals as to leases referred to in this agreed statement of facts.

A

Premises	8 South Howard Street, Akron, Ohio.
Name of lessor	Eliza E. Day.
Name of lessee	J. Harry Wiener and Helen L. Wiener.
Where lease recorded	Vol. 590, page 438, Summit County records.
Annual rental	$3,500.00 per year for first five (5) years. $4,000.00 per year for balance of term.
Date of lease	August 1, 1918.
Term of lease	99 years, renewable forever, from Aug. 1, 1918.
Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes charged against lessor or those claiming under her.
Insurance	Lessee required to carry insurance on buildings located on premises, for the benefit of lessor.
Is the insurance, in the event of loss, payable to a trustee?	Yes; lessor as trustee.
38 Are funds to be used by trustee in restoring building?	Yes; lessor to pay this money to lessee for restoring loss and replacing building to former condition.
Clauses of lease relative to restoration of building by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the buildings so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	Damage or destruction of building does not release lessee from obligation of lease. No building now standing on the premises shall be removed or razed or destroyed unless bond be given by lessee to lessor, conditioned on restoring the building.

B

Premises	79 South Main Street, Akron, Ohio.
Name of lessor	Eliza E. Day.
Name of lessee	J. Harry Wiener and Helen L. Wiener.
Where lease recorded	Vol. 590, page 441, Summit County records leases.
Annual rental	First five years, $5,000.00 per year; second five years, $6,000.00 per year; remainder of term of lease $7,200.00 per year.
Date of lease	August 1, 1918.
Term of lease	99 years, renewable forever, from Aug. 1, 1918.
Who pays taxes and assessments on building?	Lessee, excepting income or inheritance taxes charged against lessor or those claiming under her.
Insurance	Lessee is required to carry insurance on buildings located on premises, for the benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessor as trustee.
Are funds to be used by trustee in restoring building?	Yes, lessor to pay this money to lessee for restoring loss and replacing building to former condition.
Clauses of lease, relative to restoration of building, by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the building so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	Damage or destruction of building does not release lessee from the obligations of the lease. No building now standing on the premises shall be removed or razed or destroyed unless a bond be given by lessee to lessor, conditioned on restoring the building.

39 C

Premises	77 South Main Street, Akron, Ohio.
Name of lessor	John Backe and Elizabeth Backe.
Name of lessee	J. Harry Wiener.
Where lease recorded	Vol. 590, page 294, Summit County records leases.
Annual rental	First ten years & ten months, $6,000.00 per yr. Remainder of term $7,200.00 per year.
Date of lease	May 1, 1918.
Term of lease	99 years, renewable forever, from May 1, 1918.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under him might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for the benefit of lessor.
Is insurance, in the event of loss, payable to a trustee?	Yes; insurance is to be paid, in case of loss, to lessors as trustees.
Are funds to be used by trustee in restoring building?	Yes; lessors to pay the money to lessee for this purpose.
Clauses of lease, relative to restoration of buildings by lessee.	"Lessee or any subsequent owner under the lease has the right to partially or totally raze, remove, remodel, or repair any building or buildings now on the property, but agree to replace the building with one of value equal to or greater than the building so razed, removed, or otherwise altered."
Covenants by lessee as to keeping buildings upon premises.	There is a clause in the lease that damage or destruction, either partial or total, shall not operate so as to entitle either lessors or lessee to terminate lease. There is an option of purchase given to the lessee.

D

Premises	42 South Howard Street, Akron, Ohio.
Name of lessor	Lucinda Miller et al.
Name of lessee	J. Harry Wiener.
Where lease recorded	Vol. 694, page 40, Summit County records leases.
Annual rental	$4,000.00 per year for 7 yrs.; $4,500.00 per year for next three years; $5,000.00 per year for next ten years; and $6,000.00 per year for balance of term.
Date of lease	July 8, 1919.
Term of lease	99 years, renewable forever, from July 1, 1919.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under her might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
40 Is insurance, in event of loss, payable to a trustee?	Yes; insurance is to be paid, in case of loss, to lessor as trustee.
Are funds to be used by trustee in restoring building?	Yes; lessors to pay the money to lessee for this purpose.
Clauses of lease, relative to restoration of buildings by lessee.	Lessee or any subsequent owner has right to partially or totally raze, remove, remodel, or repair any building on property, but must replace the building with one of value equal to or greater than building so razed, removed, or otherwise altered.
Covenants by lessee as to keeping buildings upon premises.	Lessee is obligated to erect a building to cost not less than $30,000.00 upon the premises within twenty (20) years.
Assignment of lease	J. Harry Wiener to Louis Ostrov.
Date of assignment	May 1, 1922.
Recorded	May 31, 1922, in vol. 901, page 231, Summit County records. Consent to assignment by lessors.

E

Premises	823-825 South Main St., Akron, Ohio; 819 South Main St., Akron, Ohio; and 17 and 19 E. Voris St., Akron, Ohio.
Name of lessor	Jacob Hausch and Caroline Hausch.
Name of lessee	J. Harry Wiener.
Lease recorded	Vol. 694, page 301, Summit County records.
Annual rental	$6,000.00 per year first ten (10) years; $7,200.00 per year remainder of term.
Date of lease	Aug. 27, 1919.
Term of lease	99 years renewable forever from July 1, 1919.
Who pays taxes and assessments?	Lessee, excepting income or inheritance taxes which lessors or those interested under them might be obligated to pay.
Insurance	Insurance is to be paid in case of loss to Depositors Sav. & Trust Co., Akron, Ohio, as trustee.
Are funds to be used by trustee in restoring building?	Trustee to use money for repairing property or restoring same.
Clauses of lease, relative to restoration of buildings by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the buildings so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	There is a clause in the lease that damage or destruction, either partial or total, shall not operate so as to entitle either lessors or lessee to terminate lease.
	There is an option of purchase given to lessee.

41 Cancellation and surrender:

Dated	March 30, 1922.
Recorded	April 1, 1922, in vol. 901, page 4, Summit County records.
Signed by	Jacob Hausch, Caroline Hausch, J. Harry Wiener, and Helen L. Wiener.
Premises	Same as described in above lease.

F

Premises	616 South Main St., Akron, Ohio.
Name of lessor	Albert E. Carmichael and Jane Carmichael.
Name of lessee	J. Harry Wiener.
Lease recorded	Vol. 810, page 159, Summit County records.
Annual rental	First ten years, $2,100.00 per year; next ten years, $3,047.50 per year; balance of term, $3,657.00 per year; any renewal, $3,657.00 per year.
Date of lease	July 8, 1919.
Term of lease	99 years, renewable forever, from Aug. 1, 1919.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under them might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes, Commercial Sav. & Trust Co., trustee. Funds to be used by trustee in restoring building.
Clauses of lease, relative to restoration of building, by lessee.	"Lessee agrees to erect on premises, within a period of six (6) years, from the date of this instrument, a new building, costing not less than $25,000.00."
Covenants by lessee, as to keeping buildings upon premises.	"In event buildings now on said premises are partially or totally razed, removed, remodeled, or repaired, said replaced buildings or repaired buildings shall have a value of equal to or greater than the buildings so razed, removed, or altered."
	"Before any building is removed or destroyed, bond shall be given to lessor, conditioned on restoring said buildings."

Supplemental agreement..	By the provisions of the supplemental agreement, dated June 22, 1922, and recorded June 27, 1922, in vol. 901, page 345, Summit County records, the provisions of said lease were changed to read as follows:
Annual rental.....	Period of ten years from March, 1922, to February, 1932, $1,020.00 per year, and for ten years from March, 1932, to February, 1942, $1,200.00 per year. Balance of term, $1,500.00 per year.
Option to purchase.....	Given to lessee, for the sum of $30,000.00.
	Lessee to erect on said premises, within two (2) years from date of instrument, a new building to cost not less than $8,000.00.
42 Release of lease....	Dated April 2, 1923.
Recorded.....	April 12, 1923, vol. 948, page 208, Summit County records.
Signed by.....	Blanche Leopold, as owner of premises, and J. Harry Wiener, as lessee.
Recitations.....	Transfer of premises by Albert E. Carmichael and Jane Carmichael to Blanche Leopold.

G

Premises.....	479 South Main St., Akron, Ohio.
Name of lessor.....	John Hausch and Albertine R. Hausch.
Name of lessee.....	J. Harry Wiener.
Lease recorded.....	Vol. 694, page 367, Summit County records.
Annual rental.....	First ten years, $5,000.00 per year; second ten years, $6,250.00 per year; balance of term, $7,500.00 per year.
Date of lease.....	December 18, 1919.
Term of lease.....	99 years, renewable forever, from Jan. 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes, charged against lessors or those claiming under them.
Insurance.....	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; insurance to be paid to lessors as trustees.
Are funds to be used by trustee in restoring buildings?	Yes; lessors to pay money to lessee for this purpose.
Clause of lease relative to restoration of building, by lessee.	Lessee to make permanent improvements in the way of new buildings to the value of $10,000.00.
Covenants by lessee as to keeping buildings upon premises.	Lessee has right to partially or totally raze, remove, remodel, or repair any building or buildings on property, but agrees to replace building with one of value equal to or greater than buildings so razed, removed, or otherwise altered.
Cancellation and surrender of 99-year lease.	Dated March 30, 1922.
	Recorded April 1, 1922, in vol. 901, page 6, Summit County records.

H

Premises.....	Southeast corner of E. Tuscarawas & 3rd St., Barberton, Ohio.
Name of lessors.....	Dora M. Moore, Villa R. Kirkpatrick, Ray Kirkpatrick, Fred M. Weller, Lena Weller, Nellie Middleton.
Name of lessee.....	J. Harry Wiener.
Lease recorded.....	Vol. 810, page 600, Summit County records.
Rental.....	$10,000.00 per year, in equal quarterly installments in advance.
Date of lease.....	June 1, 1920.
43 Term of lease.....	99 years, renewable forever, from June 1, 1920.
Who pays taxes and assessments on building?	Lessee pays all excepting income or inheritance tax, which may be assessed against lessor.

Insurance	Lessee required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
Are funds to be used by trustee in restoring building?	Yes; the funds are to be available to lessee for purpose of rebuilding and restoring the buildings. The lessee must supply any excess in cost of construction not provided by insurance money.
Clauses of lease, relative to restoration of building, by lessee.	Lessee is not relieved from obligation to pay rent or to carry out terms of lease if building is destroyed from whatever cause.
Covenants by lessee as to keeping buildings upon premises.	"The lessee agrees that he will at all times during the continuance of this lease, keep all buildings now or hereafter on said premises, in continuous, good, substantial, and tenantable order and repair at lessee's own cost and expense."
	Lessee is further given the right, totally or partially, to "raze, remove, remodel, improve, or repair the improvements on the premises, but he shall first give bond to lessor in amount of the value of existing buildings that he will replace the buildings, free from mechanics' liens."
	An option to lessee to purchase the demised premises in fee simple at any time within ten (10) years from date of lease is granted in the lease.

I

Premises	36 South High Street, Akron, Ohio.
Name of lessor	Charles Wadsworth and Anna Doyle Wadsworth.
Name of lessee	J. Harry Wiener.
Lease recorded	Lease not recorded.
Annual rental	$7,800.00 per year for first ten years; $10,500.00 per year for second ten years; $12,500.00 per year during balance of term.
Date of lease	April 12, 1920.
Term of lease	99 years renewable forever from May 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance tax which lessors or those claiming under them might be obligated to pay.
Insurance	Lessee required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; the Central Savings and Trust Company, of Akron, Ohio, as trustee.
44 Are funds to be used by trustee, in restoring buildings?	Yes; any surplus to revert to lessee and lessee to furnish additional funds if insurance not sufficient.
Clauses of lease, relative to restoration of building by lessee.	Lessee may tear down and erect new buildings of a value of not less than $100,000.00 by executing proper indemnity bond of not less than $500,000.00 and furnish complete set of plans of new improvements.
	Lease not to terminate by reason of damage or destruction of buildings.
Covenant by lessee as to keeping buildings upon premises.	Lessee to keep and maintain buildings at present value of $70,000.00 or replace at a value of $100,000.00.

J

Premises	376 E. Market Street, Akron, Ohio.
Name of lessor	Flora B. Ewart.
Name of lessee	J. Harry Wiener and Louis D. Freiberg.
Lease recorded	Vol. 694, page 11, Summit County records.
Annual rental	$4,000.00 per year.
Date of lease	July 2, 1919.
Term of lease	99 years, renewable forever, from July 1, 1919.

Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessor or those claiming under her are obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessor as trustee.
Are funds to be used by trustee in restoring buildings?	Yes; trustee to pay this money for restoring building.
Covenants by lessee as to keeping buildings upon premises.	Lessee covenant to maintain on demised premises, building or buildings, the fair value of which shall be not less than $40,000.00.
Cancellation of lease	Dated Sept. 7, 1922. Recorded Oct. 9, 1922, in vol. 902, page 280, Summit County records.

K

Premises	282 E. Market Street, Akron, Ohio.
Name of lessor	Jeanette W. Weary and Frank O. Weary.
Name of lessee	The Akron Associates Co.
Lease recorded	Vol. 590, page 223, Summit County records.
Rental—annual	$2,500.00 first five years; $3,000.00 next twenty years; $4,000.00 next twenty-five years; $5,000.00 next twenty-five years; and $6,000.00 per year, during balance of term.
Date of lease	January 12, 1918.
Term of lease	99 years, renewable forever, from Jan. 15, 1918.
45 Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessor, or those claiming under them might be obligated to pay.
Insurance?	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
Are funds to be used by trustee in restoring building?	Yes.
Clauses of lease relative to restoration of building by lessee.	Lessee may remodel any building on demised premises but agrees to replace said building by one of value not less than $15,000.00.
Assignment of lease to	J. Harry Wiener and L. D. Freiberg.
Dated	April 22, 1919.
Recorded	April 28, 1919, in vol. 695, page 100, Summit County records.
Assignment of lease	By J. Harry Wiener et al. to Richard H. Leighton.
Dated	December 15, 1924.
Recorded	December 16, 1924, in vol. 1009, page 428, Summit County records.

L

Premises	192 South Main Street, Akron, Ohio.
Name of lessor	A. H. Noah.
Name of lessee	J. Harry Wiener. (On or about Nov. 1, 1919, J. Harry Wiener assigned an undivided one-half interest in lease to Louis Freiberg.)
Lease recorded	Volume 590, page 612, Summit County records of leases.
Annual rental	First five years, $10,000.00 per year; second five years, $15,000.00 per year; next 10 years, $20,000.00 per year; remaining 79 years, $25,000.00 per year.
On or about May 13, 1922, rent modified	To 31st day of May, 1922, $10,000.00 per year; next five years, $8,000.00 per year; next three years, $10,000.00 per year; next five years, $12,500.00 per year; next five years, $15,000.00 per year; remainder of term, $17,000.00 per year.

Date of lease	June 2, 1919.
Term of lease	99 years, renewable forever, from June 1, 1919.
Who pays taxes and assessments on buildings?	Lessee.
Insurance?	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
46 Are funds to be used by trustee in restoring buildings?	Yes; these funds are available to lessee for such repair or restoration, providing lessee supply any additional funds necessary to complete the repair or restoration of such buildings.
Clauses of lease relative to restoration of building by lessee.	Under Section V of the lease, the lessee is allowed to remove the buildings and improvements standing on the premises and to wreck them, providing he give bond for the restoration of the buildings so removed, of a value of not less than $100,000.00. Lessor is given right to supervise plans. Sec. XI of the lease states that the lease is not to be detetmined by reason of destruction of or damage to any building or buildings by fire or otherwise.
Covenants by lessee as to keeping buildings upon premises.	"It is mutually agreed between the parties hereto that the buildings now on said premises are of the value of more than $100,000.00, and said lessee, accordingly, hereby covenants and agrees at all times to keep and maintain the buildings and improvements from time to time on said premises in good repair and proper rentable condition and (except during periods allowed by this lease for repairs and alterations or for reconstruction, in case of loss or damage to such buildings or improvements, or for erection and construction of a new building or buildings on said premises) at all times during the term of this lease to maintain on the premises above described a building or buildings, the fair cost and value of which, excepting natural depreciation, shall be not less than $100,000.00 and in case of removal or destruction from any cause whatsoever said building or improvements or any part thereof on any buildings or improvements, at any time standing on said land, that he will replace the same at his own cost and expense with a new building or buildings, the character and fair cost and value of which shall fulfill the requirements of this lease, which replacement shall be commenced within six months and be completed, free from liens and debts, within eighteen (18) months after such removal or destruction is begun, and such replacement shall be made as often as such removal or destruction occurs." Under Sec. XV of lease, in case any difference between parties as to value of any existing building, the value is to be determined by arbitration. Sec. XVI grants option to purchase to lessee.

47 N

Premises	68 North Howard Street, Akron, Ohio.
Name of lessor	Higbee Srutowicz and Helen Srutowicz.
Name of lessee	J. Harry Wiener and Louis D. Freiberg.
Lease recorded	Vol. 810, page 44, Summit County records.
Annual rental	$2,100.00 per year for five years; $2,400.00 per year for balance of term.
Date of lease	February 13, 1920.
Term of lease	99 years, renewable forever, from March 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessors or those claiming under them might be obligated to pay.

Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessors as trustee.
Are funds to be used by trustee in restoring buildings?	Yes; these funds are available to lessee for such repair or restoration.
Clauses of lease relative to restoration of building, by lessee.	Lessee has the right to partially or totally raze, remove, remodel, or repair any building or buildings on property, but agrees to replace building with one of value equal to or greater than buildings so razed, removed, or otherwise altered.
Assignment to owners and acceptance.	Dated April 28, 1922. Recorded May 2, 1922.

Exhibit B to stipulation

(Copy of original lease)

Lease:

This indenture of lease, made in the city of Akron, county of Summit, and State of Ohio, this 12th day of April A. D. 1920, by and between Anna Doyle Wadsworth and Charles Wadsworth, of the city of Chicago, State of Illinois, hereinafter designated as "lessor," and J. Harry Wiener, of the city of Akron, Ohio, hereinafter designated as "lessee."

Witnesseth:

That the said lessor for and in consideration of the rents herein reserved and covenants and agreements hereinafter contained,
48 and by the said lessee to be paid and performed, have leased and demised, and by these presents do lease and demise unto the said lessee, his heirs and assigns all the following described real estate, to wit:

Situated in the city of Akron, county of Summit, and State of Ohio, and known as being the south 40.29 feet front and 40.37 feet in the rear of lot No. 8 in block 6, King's addition to the city of Akron, as surveyed by A. G. Mallison, surveyor and recorder in Plat Book "U," pages 555 to 566, inclusive.

Reserving to the use of the K. of P. Building Company, its successors or assigns, the right to occupy with the brick building as at present located upon said premises herein described, and more particularly described as follows: Beginning at a point in the north line of the premises herein conveyed where the same intersects the east wall of the brick building now located thereon; thence south along the east wall of said building about five (5) feet to the southeast corner thereof; thence westerly along the south wall of said building about 35 feet to the southwest corner thereof; thence northerly along the west wall of said building about five (5) feet to the north line of the premises herein described; thence easterly along the said north line about thirty-five feet to the place of beginning. It is hereby agreed and understood that the right herein reserved shall terminate upon the total or partial destruction of the above-

described brick building from any cause whatsoever and that the right herein reserved is for the occupancy of said building as at present located on the tract of land herein described.

To have and to hold the above demised premises unto the said lessee for and during the term of ninety-nine (99) years, beginning on the 1st day of May A. D. 1920, and ending on the 30th day of April, A. D. 2019, at and upon the following terms and subject to the covenants, conditions, and stipulations herein expressed and declared of and concerning the same, and renewable forever.

SECTION I. That during the term of this lease the said lessee will pay as rent to the lessor from May 1st, 1920, to April 30th, 1930, at the rate of seven thousand eight hundred dollars ($7,800.00) per year and shall pay the same in monthly installments of six hundred fifty dollars ($650.00) each month, payable on the 1st day of each month in advance, beginning May 1st, 1920.

49 For the next ten years of the term of this lease, that is, from May 1st, 1930, to April 30th, 1940, at the rate of ten thousand five hundred dollars ($10,500.00) per year and shall pay the same in monthly installments of eight hundred seventy-five dollars ($875.00) each, payable on the 1st day of each month in advance, said first payment to be made May 1st, 1930.

For the entire balance of the term of this lease and of any renewal thereof lessee shall pay to lessor rent at the rate of twelve thousand five hundred dollars ($12,500.00) per year and shall pay the same in monthly installments of one thousand forty-one and 66/100 dollars ($1,041.66) each month, payable on the 1st day of each month in advance, said first payment to be made May 1st, 1940.

All rents accruing under this lease shall be paid in gold coin of the United States of America of the present standard of weight and fineness or its equivalent, and until some other place of payment is designated in writing by the lessor such rent shall be payable to the lessee at Chicago, Illinois.

SECTION II. As a part of the consideration of this lease and additional to the rental hereinbefore provided, said lessee hereby covenants and agrees to pay punctually as and when the same becomes due all taxes, assessments, and public charges of every kind and nature levied or assessed upon the premises hereinbefore described and upon said leasehold estate thereon and upon any and all buildings and improvements thereon during said term beginning with the taxes and assessments due and payable after July 1st, 1920. Also to pay all charges, liens, penalties, and claims for damages chargeable to or payable for or in respect of the premises and leasehold estate therein, the building and improvements thereon and the use and occupation of said premises during said entire term and to indemnify and save harmless the said lessor, this lease and said premises, leasehold estate, buildings, and improvements from and against all such taxes, assessments, charges, liens, penalties, and claims for damages;

and promptly after making such payments, to furnish said lessor when notified in writing so to do with written duplicate receipt or, if impossible to obtain such, then other written evidence of payment showing that same have been paid. Provided, however, that said lessee shall not be charged with any obligations to pay any income or inheritance tax which at any time may be levied against the rental accruing hereunder by the laws of the United States, State of Ohio, or any foreign country.

Lessee further covenants that in the event of any suit or legal proceeding arising out of any act, omission, or default of or in connection with the occupation of said premises by said lessee, to which the said lessor as owner of said premises may be made a party, and in which there is or may be a liability, said lessee shall and will, at its own expense, undertake and conduct the defense of the lessor's right therein, and in that respect indemnify and save harmless the lessor from any and all liability, including liability on account of injury or damage done to the persons or property of third persons, attorneys' fees chargeable to the lessor, or any other charge arising through the occupancy and maintenance by the lessee, its agents, or employees, of the building and improvements now upon the demised premises or by reason of the negligence of the lessee, his agents or employees in the construction and maintenance of any new building or structure thereon constructed and will pay any and all judgments that may be rendered against the lessor in any such suits.

SECTION III. The said lessee hereby agrees to promptly and fully obey and comply with, at his own proper cost and expense with all lawful requirements, rules, regulations, laws, and ordinances, of all legally constituted authorities existing at any time during the continuance of this lease and in any way affecting said premises or the buildings or improvements thereon, or in the use of same, and to permit no unlawful or immoral business or occupation to be carried on upon said premises, or use to be made of any part thereof contrary to any valid law or ordinance governing the same. The lessee further covenants and agrees that he will save and keep harmless the lessor and the above-demised premises at all times during the continuance of this lease from all damages, claims, fines, attorneys' fees, penalties, costs, and expenses whatsoever that may result to the lessor or said above demised premises or to any improvements at any time situated thereon under the provisions of the present or future statutes of the State of Ohio or of the United States or concerning the sale, use, or giving away of any spirituous, fermented, or intoxicating liquors on said demised premises or in or upon any improvements at any time situated thereon.

SECTION IV. It is mutually agreed between the parties hereto that the value of the buildings now constructed upon said premises is of the value of seventy thousand dollars ($70,000.00), and said lessee accordingly hereby covenants and agrees at all times to keep and maintain the buildings and improvements from time

to time on said premises in good repair and in proper condition and (except during the periods allowed by this lease for the repairs and alterations or for reconstruction in case of loss or damage to such buildings and improvements or for the erection or construction of a new building or buildings on said premises), at all times during the term of this lease to maintain on the premises above described a building or buildings, the fair cost or value of which shall not be less than seventy thousand dollars ($70,000.00), it being the intention of the parties hereto that lessee shall keep and maintain the buildings now on said premises in like condition as the same now are in and in case of the removal or destruction from any cause whatsoever of said buildings or improvements, or any part thereon, or any buildings or improvements at any time standing on said premises, that he will replace the same at his own proper cost and expense with a new building or buildings, the character and fair cost and value of which shall not be less than one hundred thousand dollars ($100,000.00), which replacement shall be commenced within six (6) months after the date of destruction and shall be completed free from liens and debts within eighteen (18) months after such removal or destruction is begun, unless lessee shall be delayed or prevented from completing said reconstruction by war, strikes, or lockouts, in which event the said new buildings shall be constructed and completed as herein provided within eighteen months (18), exclusive of the time lost by the delay caused by war, strikes, or lockouts.

SECTION V. It is further covenanted and agreed by and between the parties hereto that the lessee may tear down and wreck the improvements now standing on said premises for the purpose of erecting and constructing thereon new buildings and improvements of the value of not less than one hundred thousand dollars ($100,000.00), and in accordance with the provisions hereof, and at any time when the lessee shall not be in default of any of the covenants and
52 conditions herein contained to be kept, observed, and performed by the lessee and shall have paid all the rentals, taxes, assessments, insurance premiums, and other charges of every kind which shall have accrued under this lease at the date of his beginning so to wreck or remove said improvements and not then unless the lessee shall have executed and delivered to the lessor his surety bond hereinafter required, and it is further agreed that all materials and wreckage of the improvements torn down or removed for the purpose of erecting said new improvements as aforesaid may be taken and applied by the lessee for his own use without making payment therefor.

It is further expressly understood and agreed that lessee will before commencing to wreck or remove improvements now or then standing on said premises execute and deliver to the lessor a good and a sufficient bond with surety or sureties approved by and satisfactory to the lessor, or with surety signed by a surety or bonding

company having net assets of not less than five hundred thousand dollars ($500,000.00), and authorized to do business in the State of Ohio, said bond to be in the principal sum of one hundred forty thousand dollars ($140,000.00) payable to the lessor, conditioned that such new improvements shall be erected as herein prescribed and when such improvements are completed and paid for free and clear from any liens of mechanics, material men, or other claims, or the possibility thereof, the principal of said bond shall be satisfied and said bond shall be cancelled and returned.

It is further covenanted and agreed that lessee will, before proceeding with the work of the construction of said new improvements, upon the request of the lessor in writing furnish to the lessor a complete set of the final plans and specifications of such proposed new improvements to the end that the lessor may be able to see in advance that the requirements hereinbefore stated in this lease concerning said new improvements will be fully complied with, and the lessee covenants and agrees that said improvements shall be constructed in accordance with said plans and specifications.

SECTION VI. Said lessee further covenants and agrees to keep the buildings and improvements now and hereafter
53 upon the leased premises during the term of this lease insured against loss or damage by fire in responsible insurance companies, authorized to do business in the State of Ohio, in an amount equal to not less than the full insurable value of the fair cost of the construction of such buildings and improvements, with a clause in each policy providing that loss, if any, shall be payable to The Central Savings and Trust Company, of Akron, Ohio, as trustee, for the parties hereto, or to such other bank or trust company in Akron, Ohio, as the lessor may from time to time designate as such trustee; provided, further, that if the lessor herein desires and is able to insure said buildings in any amount or amounts in excess of the insurance thus carried by lessee, lessor may procure said further insurance and upon depositing the policies therefor with said trustee, lessor may collect and lessee shall pay the premiums on said additional insurance as the same are payable. Said policies shall be procured by the lessee and delivered to and lodged with such trustee, and in case of a loss covered by said insurance all money collected under such policies shall be paid to and held by such trustee for said parties and as security to the lessor for the repair of such loss or damage or the rebuilding of the buildings and improvements on said land and as security to the lessor for the payment of rent, taxes, assessments, and other charges and sums, herein agreed to be paid by the lessee; it being understood, however, that all amounts so collected shall be available to the lessee for such repairs or reconstruction as the case may be, and shall be by such trustee paid out from time to time on architect's estimates, or builder's vouchers, showing the application of the amount paid for such repair or reconstruction, and then only upon the presentation of waivers of right to lien by all contractors or others that have furnished material or perf ormed labor

on said premises; provided, however, that it first be made to appear to the satisfaction of the trustee that the lessee has provided for all additional funds necessary for such repairs or reconstruction of any such buildings or improvements so injured or destroyed according to the plan adopted therefor, which may be in excess of the amount received upon such insurance policies, and if said damage shall be completely repaired, or said buildings and improvements shall be rebuilt or restored to the condition as by this lease required
54 for the time being, without the expenditure of all the money so received from said insurance policies and all rents, taxes, assessments, and other charges and sums herein agreed to be paid by the lessee, which up to that time have become due and payable, shall have been paid and discharged by said lessee, then the surplus of such insurance money shall be paid by the trustee to the lessee; otherwise said rents, taxes, assessments, other charges or sums shall be first deducted from such surplus and paid to the lessor; and the lessee further agrees to pay all reasonable charges, costs, and expenses of the trustee for handling and collecting the insurance under the provisions hereof.

The lessee further covenants and agrees that if the amount so recovered from said insurance policies shall not be sufficient to properly repair the damage incurred, or to restore or construct, a building or buildings and improvements upon said premises which shall comply with the requirements of this lease, he will furnish all additional funds necessary for such purpose.

Provided, always, that in case the lessee does not enter upon the reconstruction or repair of such building or buildings and improvements, and prosecute the same to completion in the manner and within the time required by the terms of this lease, then the amount so collected or the balance thereof remaining in the hands of the trustee, as the case may be, shall be held by the trustee as security for the continued performance and observance by the lessee of the terms, conditions, and covenants of this lease upon him so devolving, and if in such case, or in case of the violation of or noncompliance with any of the other terms, covenants, or conditions of this lease, the lessor shall have exercised his option to terminate this lease as herein provided, then said trustee shall pay to the said lessor all the funds in its possession, to fully compensate said lessor for any and all damages and loss which they have sustained by reason of any of said defaults and noncompliance of said lease.

SECTION VII. In case of any default on the part of the lessee in procuring and delivering the policies of insurance as hereinabove required, or in the payment of any amount or amounts herein required to be paid by him, other than the amounts payable as
55 rent, so-called, the lessor may procure and pay for such insurance, and make other payment or payments, and the lessee hereby covenants and agrees thereupon and at once to reimburse and pay the said lessor the sums so paid, with interest thereon at the rate of eight per cent (8) per annum from the date of payment.

SECTION VIII. The parties hereto mutually agree that the whole amount of rent to be received by the lessor and agreed to be paid hereunder by the lessee, and all other moneys due hereunder by reason of any engagement of the lessee, are and always shall be a valid and first lien upon the building or buildings and improvements from time to time upon said premises, and upon all of the interest of the lessee in said premises and in this lease.

SECTION IX. Said lessee futher covenants and agrees that he will not permit or suffer any mechanics', material men's, or other liens or charges to stand against the leased premises or property which might in any way injure or incumber or become a lien upon said leased premises and property prior or paramount to the interest of the lessor herein, and that, except as hereinafter provided, he will forthwith, upon demand, pay and discharge any and all such liens and charges; and that he will commit no waste upon said leased premises or buildings or improvements thereon, at any time during the term of this lease.

SECTION X. Lessee further covenants and agrees that no assignment or transfer of this lease shall be made by said lessee at any time without written consent of the lessor, unless said lessee shall up to that time have observed and performed all the terms, conditions, and covenants of this lease devolving upon him and shall have made and paid for the improvements so that the buildings on said premises at the date of said assignment shall be of the value of one hundred thousand dollars ($100,000.00); provided, however, that this lease may be assigned and transferred before the value of the building on said premises is of the value of one hundred thousand dollars ($100,000.00), providing said lessee, his heirs or assigns, execute and deliver to the lessor a bond with individual or personal sureties approved by and satisfactory to the lessor, her heirs
56 or assigns, or with sureties signed by some surety or bonding company having net assets in the sum of five hundred thousand dollars ($500,000.00) authorized to do business in the State of Ohio, said bond to be in the principal sum of forty thousand dollars ($40,000.00), payable to the lessor, their heirs or assigns, shall observe and perform all the terms and conditions of this lease and that said lessee, his heirs or assigns, will erect and construct a new building on said premises, or improvements to the building now on said demised premises which shall increase the value of said building so that the same shall be of the value of one hundred thousand dollars ($100,000.00), and upon the failure of the said lessee, his heirs or assigns, so to perform the terms and conditions of this lease and to make the improvements herein required to be made, the principal sum of said bond shall be forfeited and paid to the lessor, their heirs or assigns, and upon said payment the lessee, his heirs or assigns, shall be released from the obligation to construct said new building or to make said alterations in present building so that the value of same shall be one hundred thousand dollars ($100,000.00).

Said assignment shall not then be made unless the lessee shall have first delivered to the lessor for inspection during a period of three days a legal and sufficient instrument of assignment to and assumption of the covenants by such assignee; nor unless such instrument be recorded in the office of the recorder of Summit County, Ohio, at about the time of the delivery thereof; provided however, that the lessee may, at any time after date of this instrument directly or by conveyance in trust for that purpose, mortgage or pledge his estate in the premises to secure any actual debt, but the right of the lessor to have a first lien upon said premises, the interest of the lessee therein, and upon the buildings and improvements thereon as provided in Section VIII of this lease, shall not be in any manner affected thereby.

SECTION XI. This lease shall not terminate by reason of the destruction of or damage to any building or buildings and improvements, now or hereafter on said premises by fire or otherwise, any law of the land to the contrary notwithstanding, and neither of the parties hereto shall be thereby released from any obligation created or imposed upon them thereby.

37 SECTION XII. The waiver by the lessor of any breach of any of the terms, conditions, covenants, or stipulations of this lease on the part of the lessee shall not be construed to be a waiver of any other term, condition, covenant, or stipulation, or any subsequent breach of the same term, condition, covenant, or stipulation.

SECTION XIII. All notices which may be proper and necessary for the parties hereto to serve upon each other shall be in writing, and upon the lessor at their residence in Chicago, Illinois, and upon said lessee at No. 71 Bowery Street, Akron, Ohio, or made upon a resident bank or trust company or agency at Akron, Ohio, as either party may by notice in writing served upon the other from time to time designate and appoint.

SECTION XIV. Nothing in this lease contained shall prevent the lessee from contesting, at his own expense, any unlawful tax, charge, lien, or claim of whatsoever nature, in respect to the premises hereby leased; and the lessee may, in the name of the lessor, or in his own name, contest or oppose such unlawful tax, charge, lien, or claim, of whatsoever nature, without liability of forfeiture of this lease, and any resulting delay in the settlement of said taxes or other charges, liens, or claims, shall not jeopardize the interest held or acquired by said lease.

SECTION XV. In the event of any difference arising between the parties hereto as to the value of any of the building or buildings and improvements now or hereafter constructed, or being maintained upon the leased premises, such differences shall be determined by arbitration by three disinterested free holders of the county of Summit, Ohio, one of whom shall be chosen by each of the parties hereto, and the two chosen shall select a third, and the decision of any of the two said arbitrators shall be final and conclusive upon the parties hereto, which decision shall be in writing, signed in duplicate

by any two of said arbitrators, and delivered one to the lessor and the other to the lessee.

The party desiring such arbitration as aforesaid shall give written notice to the other party of such desire, naming therein the arbitrator selected by him, and the party so notified shall, within ten (10) days after receiving same, name his arbitrator and give written notice thereof to the other party. In the event such party
58 shall fail, within said period of ten (10) days, to name his arbitrator, and so notify the other thereof in writing, or in the event the two so chosen shall fail, within thirty (30) days, to agree upon the third, then the judge of the probate court of Summit County, Ohio, or any other court of said county, shall, on the request of the party not in default, or on the request of either party, as the case may be, and within fifteen (15) days thereafter, appoint a disinterested free holder of the county of Summit, Ohio, to fill the place of the arbitrator remaining vacant by reason of the failure of one of the parties hereto to appoint his arbitrator, or by reason of the failure of said two arbitrators to agree upon the third and said board of arbitration shall make its findings and report its decision within thirty (30) days from the date on which the last member of said board was selected or appointed, as provided for herein.

In every case in which matters under this lease are submitted to arbitrators, one half of the expense of such arbitration shall be borne by the lessor and the other half by the lessee.

SECTION XVI. This lease is made upon the condition that the lessee shall punctually perform, observe, and comply with all of the terms, conditions, covenants, agreements, and stipulations by him to be performed, observed and complied with hereunder, and if at any time there shall be any default on the part of the lessee in the performance of any of the terms, conditions, covenants, agreements, and stipulations by him to be performed, observed, and complied with hereunder, the lessor may serve upon the lessee at any time after such default a written notice of such default, and if such default continues for a period of thirty (30) days after the service of said written notice, the lessor may at any time after the expiration of such thirty (30) days, elect to terminate this lease and re-enter upon the premises and have possession thereof, and sue for and collect all amounts for the payments of which the lessee shall then be in default, and thenceforth this lease shall be void to all intents and purposes, and any and all buildings and improvements then upon said premises shall become the property of the lessor without compensation to be paid therefor, and as a full and complete forfeiture of the rights of the lessee; or the lessor may at any time after such default hereunder sue for and collect any and all sums due
59 them hereunder as well as for all damages they may have sustained by reason of such default, without forfeiting this lease, at their option.

SECTION XVII. The lessee hereby waives all demands which are or may be necessary and required, either by the provisions of this lease or by law, and the lessee agrees that in case of default of any of the

terms, conditions, covenants, stipulations, and provisions of this lease that the same effect will be given to said default as if all demands which are required by this lease or are or may be necessary by law had been fully and properly made.

SECTION XVIII. The remedies given in this instrument to the lessor are cumulative and shall be in addition to all other remedies now or hereafter existing, whether at law, in equity, or by statute.

SECTION XIX. It is further agreed by the said lessee to and with the said lessor, as a part of the consideration of this lease, that any new building or buildings or improvements erected on the herein demised premises during the term of this lease shall upon the expiration or termination hereof revert to and become the property of the said lessor.

SECTION XX. Lessor does hereby transfer and assign to the said lessee all rights of said lessor under and all interest in existing leases on said demised premises, the rents reserved thereby, and any of the benefit and advantages in any way thereafter to accrue to the lessor therefrom, and the said lessee takes this lease subject to all existing leases now on said premises, and the lessor further covenants and agrees that the lessee shall have peaceable possession and enjoyment of the leased premises without lawful let, hindrance, or disturbances of any person or persons, whomsoever, by, through, or under the lessor, excepting only as hereinbefore expressed, providing however, the said lessee will comply with all the terms and conditions of this lease.

SECTION XXI. All of the grants, terms, covenants, conditions, and stipulations in this lease contained shall inure to the benefits of the and be binding upon the parties thereto and their respective heirs, personal representatives, successors, and assigns, whether or not the same be expressed.

60 In testimony whereof the parties to this lease set their hands to duplicates hereof this 12th day of April, A. D. 1920.

ANNA DOYLE WADSWORTH.
CHARLES WADSWORTH.
J. HARRY WIENER.

Signed and acknowledged in the presence of—

C. BLAKE MCDOWELL.
MABEL BENKHEUSER.

STATE OF OHIO,
Summit County, ss:

Before me, a notary public in and for said county, personally appeared Anna Doyle Wadsworth and Chas. Wadsworth and J. Harry Wiener, who acknowledged that they did sign the foregoing instrument, and that the same is their free act and deed.

In testimony whereof I have hereunto set my hand and official seal at Akron, Ohio, this 12th day of April, 1920.

C. BLAKE MCDOWELL,
Notary Public.

In United States District Court

Memorandum opinion

Filed Dec. 9, 1926, in cases Nos. 12,414 and 12,429

WESTENHAVER, District Judge.

These actions are brought to recover income taxes for the years 1918, 1919, and 1920, paid under protest. The conditions precedent to the right to maintain them have been complied with. They have been heard and submitted upon an agreed statement of facts. As all material facts and questions of law are the same in both cases, they will be disposed of in one memorandum.

61 The question involved is the right of plaintiff, as lessee of real estate under 99-year leases, renewable forever, to deduct depreciation on buildings in addition to a deduction of all sums paid as rent or for repairs and maintenance. This right is claimed under favor of the provisions of the revenue act of 1918, in force when the taxes were levied and assessed. Its pertinent provisions are as follows:

"SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * * * *

"(8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The foregoing is an old provision. It is found substantially in the same terms in the corporation excise tax law of 1909. It has been reenacted in precisely the same form in all subsequent revenue acts. It has been given a uniform departmental construction ever since it was so enacted, and that construction is the one adopted and applied in the present cases.

The object of the law, as well as its effect, is to get an accurate determination of the taxpayer's annual income. If he has capital invested in buildings and those buildings are used in his trade or business, it is necessary to allow and deduct a reasonable depreciation in order that his net income may be correctly ascertained. If he has no capital so invested, his net income will be correctly determined by deducting from his gross income all rent paid for the use of the buildings in which he carries on his trade or business. When the facts of the present case are stated and rightly understood, no different situation will be presented.

The plaintiff during the years 1918, 1919, and 1920 was the owner of 99-year leases, renewable forever, on 13 separate parcels of real estate. None of these leases were acquired prior to March 1, 1913, the date when the income tax amendment went into effect. On the contrary, nearly all were acquired during the profiteering years 1918 and 1919. He paid no money by way of bonus or purchase

price for any one of the leases, but agreed to pay, after having
62 possession, an annual rent at stated intervals. He did not use or occupy any one of them in carrying on any trade or business, but merely sublet the same to tenants and collected the rents. In ascertaining his net taxable income, he was permitted to deduct all sums paid by him for repairs, maintenance, and upkeep, as well as the full amount of all sums paid as rent. It is stipulated that he was also permitted to deduct depreciation upon all buildings which were erected or paid for by him. All the leases contain forfeiture clauses permitting the lessor, on thirty days' written notice, to avoid the same and enter into possession, both for failure to pay rent or to comply with any of the other covenants or provisions.

In my opinion, plaintiff's net income from these leases was correctly ascertained. He is not entitled to any other or additional deduction than was given him. Inasmuch as he had no capital investment in these leases, any allowance for depreciation on buildings would be a contribution to his capital account rather than a deduction in order to prevent an inclusion of some part of his capital as income. In substance and for all practical purposes, his annual payment of rent bought only a term for one year in the several leased premises. Hence, when he is permitted to deduct the full amount of the rent paid, together with repairs and maintenance, he is made whole with respect to his net income. Any further and additional allowance by way of depreciation of invested capital would be a mere contribution.

Even if it be true, as is urged, that under the law of Ohio a 99-year lease, renewable forever, is not personalty but is a freehold estate in lands and has many of the attributes of an estate in fee, the situation for income-tax purposes is not thereby changed. Nor is it material that the lessee is not exonerated from liability in the event a building may be destroyed, or that he is required to erect a new building within a given period, or that in the event of the destruction by fire or otherwise of any building he is required to replace the same with another of equal or greater value, or that he is required to maintain the buildings at their present value or at any stated value. The several leases contain clauses imposing these obligations and impose forfeiture for failure to comply with them. But the important fact is that during the several years in question here the plaintiff did not make any such capital expenditures and has been permitted
63 to deduct all sums paid for rent or for repair and maintenance and has been allowed proper depreciation on all buildings erected or paid for by him. It will be time enough to consider the question of allowing depreciation, under any of the conditions above stated, when the contingency shall have happened.

That such a contingency may never happen is evidenced by the history of the leases in question subsequent to the year 1920. It appears from the agreed statement of facts that leases D and K have

been assigned to third persons with the consent of the lessor; that leases E, G, and I have been cancelled and surrendered to the lessor; and the leases N and F have been assigned or released to the lessor. Thus, out of thirteen leases, seven have passed out of the picture without imposing on the plaintiff the obligation to invest any capital. If he had been permitted to retain some part of the net income under the guise of a capital depreciation, he would have merely pocketed an unearned increment.

The departmental construction adopted and applied to the plaintiff's tax returns is in accordance with old regulations. Depreciation has never been allowed except to replace capital investment. The capital invested has always been held to be the cost of the property in respect to which the allowance is made, if the property is acquired since March 1, 1913, and if acquired prior thereto its value as of that date. Apparently these regulations have never been challenged. In numerous cases before the Board of Tax Appeals the law has been so construed and applied. The repeated reenactment by Congress of the same provisions after this department construction was given thereto is the equivalent of an adoption and reenactment of that construction. If the meaning of the law were otherwise doubtful, as we think it is not, this departmental construction and congressional reenactment would be controlling, in accordance with familiar principles. See Trumbull Steel Co. vs. Routzahn, 292 Fed. 1009.

Judgment with costs will be rendered against plaintiff in defendants' favor. An exception may be noted.

D. C. WESTENHAVER, *Judge.*

DECEMBER 9, 1926.

64 In United States District Court

Petition for writ of error

Filed Jan. 29, 1927, in case No. 12,414

Now comes the plaintiff and says that on the 8th day of January, 1927, this court entered a judgment herein in favor of defendant and against plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue out of the United States Circuit Court of Appeals from the Sixth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and the plaintiff here tenders a bond in such amount as the court may require as security for costs, and prays the allowance of this writ of error.

COMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Assignments of error

Filed Jan. 29, 1927, in case No. 12,414

The plaintiff in this cause, in connection with its petition for a writ of error, makes the following assignments of error in the finding and judgment heretofore rendered herein upon the trial of this cause, to wit:

(1) That the finding and judgment herein are contrary to the evidence and the agreed statement of facts herein submitted;

(2) That under the pleadings and agreed statement of facts and of the evidence in the case, the finding and judgment should have been in favor of the plaintiff;

(3) That the court erred in overruling the motion for a new trial filed by the plaintiff;

65 (4) That the finding and judgment are contrary to law; and

(5) For other errors apparent on the record.

COMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order allowing writ of error

Jan. 29, 1927, case No. 12414

This day came the plaintiff, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars, to the approval of this court, which shall operate as security for costs.

[Bond on writ of error, case No. 12414, for $500.00, approved and filed Feb. 5, 1927, omitted in printing.]

67 **In United States District Court**

Writ of error

Filed Feb. 5, 1927, in case No. 12,414

United States Circuit Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Northern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said District Court, before you or some of you, between J. Harry Wiener, as plaintiff, and Harry H. Weiss, as collector of internal revenue of the United States, at Cleveland, Ohio, as defendant, a manifest error hath happened, to the great damage of the said J. Harry Wiener, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 7th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States of America the one hundred and fifty-first.

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.
[SEAL.] By F. J. DENZLER, *Deputy Clerk.*

68 Allowed by:
D. C. WESTENHAVER,
Judge of the District Court.

* Not exceeding 30 days from the day of signing the citation.

Return on writ of error

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court a full, true, and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the precipe filed, to the United States Circuit Court of Appeals for the Sixth Circuit.

There is annexed hereto, and made part of this return, the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said district, this ——— day of ———, A. D. 19—, and in the 15— year of the independence of the United States of America.

———, *Clerk.*
By ———, *Deputy Clerk.*

69 [Citation in usual form, case No. 12414, showing service on Irene Nungesser omitted in printing.]

71 In United States District Court

Stipulation re certification of record

Filed Feb. 5, 1927, in case No. 12414

In accordance with section 7 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

CUMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

A. E. BERNSTEIN,
U. S. Atty., Attorney for Defendant.

In United States District Court

Precipe for transcript

Filed Feb. 5, 1927, in case No. 12414

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders:

Petition (amended) and precipe.
Answer to amended petition.
Stipulation waiving jury.
Agreed statement of facts.
Memorandum of findings and opinion.
Judgment (journal entry).
Motion for new trial.
72 Order overruling motion for new trial.
Petition for writ of error.
Assignments of error.
Order allowing writ of error.
Bond.
Writ of error.
Return on writ of error.
Citation.
Stipulation in re certification of record.
Precipe.
Defendant's request to court for findings of fact.
Stipulation as to lease of properties.
Stipulation and order that answer be filed as of Dec. 7, 1926.

And deliver all papers to the Gates Legal Publishing Company for printing.

COMMINS, BROUES, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Orders extending time for filing transcript of record

In case No. 12414

Date of order		
March 5, 1927.	April 6, 1927.	Westenhaver
April 5, 1927.	April 13, 1927.	Westenhaver.

73 In United States District Court

Petition for writ of error

Filed Jan. 29, 1927, in case No. 12,429

Now comes the plaintiff and says that on the 8th day of January, 1927, this court entered a judgment herein, in favor of defendant and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue out of the United States Circuit Court of Appeals from the Sixth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and the plaintiff here tenders a bond in such amount as the court may require as security for costs, and prays the allowance of this writ of error.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Assignments of error

Filed Jan. 29, 1927, in case No. 12,429

The plaintiff in this cause, in connection with its petition for a writ of error, makes the following assignments of error in the finding and judgment heretofore rendered herein upon the trial of this cause, to wit:

(1) That the finding and judgment herein are contrary to the evidence and the agreed statement of facts herein submitted;

74 (2) That under the pleadings and agreed statement of facts and of the evidence of the case the finding and judgment should have been in favor of the plaintiff;

(3) That the court erred in overruling the motion for a new trial filed by the plaintiff;

(4) That the finding and judgment are contrary to law; and

(5) For other errors apparent on the record.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order allowing writ of error

Jan. 29, 1927, case No. 12,429

This day came the plaintiff, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars, to the approval of this court, which shall operate as security for costs.

75 [Bond on writ of error, case No. 12,429, for $500.00, approved and filed Feb. 5, 1927, omitted in printing.]

77 In United States District Court

Writ of error

Filed Feb. 5, 1927, in case No. 12429

United States Circuit Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable the judge of the District Court of the United States for the Northern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between J. Harry Wiener, as plaintiff, and C. F. Routzahn, as collector of internal revenue of the United States, at Cleveland, Ohio, also known as the Eighteenth District of Ohio, as defendant, a manifest error hath happened, to the great damage of the said J. Harry Wiener, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 7th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further

* Not exceeding 30 days from the day of signing the citation.

to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States of America the one hundred and fifty-first.

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.

[SEAL.] By F. J. DENZLER,
Deputy Clerk.

78 Allowed by D. C. Westenhaver, Judge of the District Court.

Return on writ of error

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court a full, true, and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the precipe filed, to the United States Circuit Court of Appeals for the Sixth Circuit.

There is annexed hereto and made part of this return the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said District, this ..... day of ..... A. D. 19.., and in the 15.. year of the Independence of the United States of America.

....., *Clerk.*
By ....., *Deputy Clerk.*

[Citation in usual form, Case No. 12429, showing service on Irene Nungesser, omitted in printing.]

81 In United States District Court

Stipulation re certification of record

Filed Feb. 5, 1927, in case No. 12429

In accordance with section 7 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

CUMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.
A. E. BERNSTEIN, *U. S. Attorney,*
Attorney for Defendant.

In United States District Court

Orders extending time for filing transcript of record

In case No. 12429

Date of order	Extension of time	Judge
March 5, 1927.	April 6, 1927.	Westenhaver.
April 5, 1927.	April 13, 1927.	Westenhaver.

82 In United States District Court

Precipe for transcript

Filed Feb. 5, 1927, in case No. 12429

To the CLERK:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Petition and precipe.
Answer.
Stipulation waiving jury.
Agreed statement of facts (only one filed for both cases).
Memorandum of findings and opinion (only one filed for both cases).
Judgment (journal entry).
Motion for new trial.
Order overruling motion for new trial.
Petition for writ of error.
Assignment of error.
Order allowing writ of error.
Bond.
Writ of error.
Return on writ of error.
Citation.
Stipulation in re certification of record.
Precipe.
Motion by deft. for judgment on record and stipulation of facts.
Stipulation as to lease of properties (only one filed for both cases).
Stipulation and order that answer be filed as of Dec. 7, 1926.

And deliver all papers to the Gates Legal Publishing Company for printing.

COMMINS, BROUSE, ENGLEBRECK & MCDOWELL,
Attorneys for Plaintiff.

83-84 [Clerk's certificate to foregoing transcript omitted in printing.]

85 [Appearances of counsel omitted in printing.]

86 In United States Circuit Court of Appeals, Sixth Circuit

Motion to dismiss, No. 4930

Filed Aug. 23, 1927

And now comes defendant in error and moves the court to dismiss the writ of error filed herein and for cause shows:

First. That it appears that no special findings of fact were made by the District Court in this cause; no request was made by the plaintiff for the court to make special findings of fact; no exceptions were reserved by the plaintiff to the failure of the court to make special findings of fact; no exception was reserved by the plaintiff to the conclusions of law drawn by the court; and neither by motion nor in other manner did the plaintiff present any propositions of law to the court and obtain a ruling on them.

Second. That no demurrer or other pleading of any kind was filed by the plaintiff, raising any question on the pleadings in this cause.

Third. That no question presented by the assignment of errors may be considered by this court.

A. E. BENSTEEN,
U. S. Attorney.
IRENE NUNGESSER,
Asst. U. S. Attorney.

A. W. GREGG,
General Counsel, Bureau of Int. Rev.,
F. W. DEWART,
Special Attorney, Bureau of Int. Rev.,
Of Counsel.

87 In United States Circuit Court of Appeals

Motion to dismiss, No. 4931

Filed Aug. 23, 1927

And now comes defendant in error and moves the court to dismiss the writ of error filed herein and for cause shows:

First. That it appears that no special findings of fact were made by the District Court in this cause; no request was made by the plaintiff for the court to make special findings of fact; no exceptions were reserved by the plaintiff to the failure of the court to make special findings of fact; no exception was reserved by the plaintiff to the conclusions of law drawn by the court; and neither by motion nor in other manner did the plaintiff present any propositions of law to the court and obtain a ruling on them.

Second. That no demurrer or other pleading of any kind was filed by the plaintiff, raising any question on the pleadings in this cause.

Third. That no question presented by the assignment of errors may be considered by this court.

A. E. BERNSTEEN,
U. S. Attorney.
IRENE NUNGESSER,
Asst. U. S. Attorney.

A. W. GREGG,
General Counsel, Bureau of Int. Rev.,
F. W. DEWART,
Special Attorney, Bureau of Int. Rev.,
Of Counsel.

88 In United States Circuit Court of Appeals

Notice of filing of motion to dismiss, No. 4930

Filed Aug. 23, 1927

TO J. HARRY WIENER, PLAINTIFF IN ERROR, AND TO COMMINS, BROUSE, ENGLEBECK, AND McDOWELL, YOUR ATTORNEYS OF RECORD:

Please take notice that I have filed a motion to dismiss the writ of error in this cause, a copy of which is attached to this notice, and that on the ——— day of ———, 1927, or as soon thereafter as counsel can be heard, I will submit the same to the honorable Circuit Court of Appeals at Cincinnati, Ohio, for decision.

A. E. BERNSTEEN,
U. S. Attorney,
IRENE NUNGESSER,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue,
F. W. DEWART,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

The undersigned, attorneys of record for J. H. Wiener, plaintiff in error, herewith acknowledge a copy of the motion to dismiss in the above-entitled action filed by defendant in error and also a copy of the notice which is attached to this acknowledgment of service.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attys. for Plff. in Error.

89 In United States Circuit of Appeals

Notice of filing of motion to dismiss, No. 4931

Filed Aug. 23, 1927

TO J. HARRY WIENER, PLAINTIFF IN ERROR, AND TO COMMINS, BROUSE, ENGLEBECK, AND McDOWELL, YOUR ATTORNEYS OF RECORD:

Please take notice that I have filed a motion to dismiss the writ of error in this cause, a copy of which is attached to this notice, and

that on the ——— day of ———, 1927, or as soon thereafter as counsel can be heard, I will submit the same to the honorable Circuit Court of Appeals at Cincinnati, Ohio, for decision.

A. E. Bernsteen,
U. S. Attorney,
Irene Nungesser,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

A. W. Gregg,
General Counsel, Bureau of Internal Revenue,
F. W. Dewart,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

The undersigned, attorneys of record for J. H. Wiener, plaintiff in error, herewith acknowledge a copy of the motion to dismiss in the above-entitled action filed by defendant in error, and also a copy of the notice which is attached to this acknowledgment of service.

Commins, Brouse, Englebeck & McDowell,
Attorneys for Plaintiff in Error.

90 In United States Circuit Court of Appeals

Nos. 4930, 4931

Motion to file brief as amicus curia

Filed Aug. 31, 1927

To the Circuit Court of Appeals for the Sixth Circuit.

The undersigned respectfully move that they be given leave to file the annexed brief, as friends of the court, for the following reasons:

This cause involves the question of the right of a lessee under a long-term lease of real property including buildings (the terms of which lease place the burden of bearing the exhaustion, wear and tear, and obsolescence of said buildings upon the lessee) to claim a deduction from gross income for such exhaustion, wear and tear, and obsolescence under the provisions of the revenue act of 1918, in the process of computing net income for the purposes of taxation under that act.

Similar questions are now pending (for divers taxable years) between the Public Service Corporation of New Jersey and affiliated corporations (for which the undersigned are counsel) and representatives of the United States, in the Bureau of Internal Revenue, involving upwards of $1,000,000 in taxes.

The Commissioner of Internal Revenue declined to rule in favor of said Public Service Corporation of New Jersey by reason of the decision of the District Court in this case, and the decision of this court will undoubtedly be regarded as persuasive or controlling

authority in the Public Service Corporation's proceeding. Therefore the Public Service Corporation, as well as numerous other taxpayers similarly situated, for several of which the undersigned are also of counsel, is vitally interested in the form of the opinion which this court may render in this case and the effect of its decision upon similar, if not identical, situations.

Since the attorneys for the plaintiff in error herein have, in
91 their brief, predicated their argument principally upon the effect, under Ohio law, of the terms of the particular leases under which the plaintiff in error holds title, rather than upon the construction to be given, throughout the United States, to the provisions of the revenue act of 1918 as applied to a situation such as that presented by the facts herein, the undersigned feel that a presentation of the points contained in the annexed brief may be of assistance to the court in deciding the instant case and in rendering a favorable opinion which, if cited as authority, will be fairly applicable in the case of the Public Service Corporation and other similarly situated taxpayers.

Accordingly, the Public Service Corporation has requested the undersigned to file a brief in this case, if the court be agreeable, showing the reasons why they believe that the judgment of the District Court herein should be reversed.

We further respectfully move, if it be permissible under the rules and precedents of this court, that we be granted the privilege of being heard orally at the argument of this cause.

HOLMES, BREWSTER & IVINS,
815 Fifteenth Street, NW.,
Washington, D. C.

E. A. ARMSTRONG,
Public Service Corporation of
New Jersey, Newark, N. J.

AUGUST 15, 1927.

Receipt of a copy of the annexed motion and brief is acknowledged. We hereby consent to the granting of the annexed motion and join in the prayer thereof.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for the Plaintiff in Error.

92 In United States Circuit Court of Appeals

Nos. 4930, 4931

Order denying motions to dismiss

Filed Oct. 6, 1927

It appearing that the cases were heard upon agreed statements of fact and that in such case no further finding of facts is essential to the right of review (279 Federal 57, 60):

It is, therefore, ordered that the motions to dismiss be denied.

Leave is granted to file brief of Holmes, Brewster & Ivins and Mr. E. A. Armstrong as amici curiæ. No oral argument is permitted to those appearing only as amici curiæ.

In United States Circuit Court of Appeals

Argument and submission

Nos. 4930, 4931

(January 13, 1928—Before DENISON, MOORMAN, and TUTTLE, JJ.)

These causes are argued together by Mr. Edwin W. Brouse and Mr. James S. Y. Ivins for the plaintiff in error and by Mr. F. W. Dewart, special attorney, Bureau of Internal Revenue, for the defendants in error and are submitted to the court.

In United States Circuit Court of Appeals

Judgment, No. 4930

Filed June 30, 1928

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this
93 cause be and the same is hereby reversed with costs and the cause remanded for further proceedings consistent with the opinion of this court.

In United States Circuit Court of Appeals

Judgment, No. 4931

Filed June 30, 1928

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby reversed with costs and the cause remanded for further proceedings consistent with the opinion of this court.

94 In United States Court of Appeals, Sixth Circuit

Nos. 4930-4931

J. HARRY WIENER, PLAINTIFF IN ERROR
vs.
HARRY H. WEISS AND C. F. ROUTZAHN AS COLLECTORS of Internal Revenue, defendants in error

Error to United States District Court, Northern District of Ohio, Eastern Division

Decided June 30, 1928

Opinion

Filed July 11, 1928

Before DENISON and MOORMAN, Circuit Judges, and TUTTLE, District Judge.

MOORMAN, Circuit Judge: Plaintiff in error was engaged in the business of holding property under long-term leases and subletting it for shorter terms for occupancy by or under subtenants. In his income-tax returns for 1918, 1919, and 1920, he claimed allowances for exhaustion, wear, and tear of thirteen buildings held by him under ninety-nine year leases, renewable forever. His claims were disallowed, and after paying the taxes assessed he brought these suits to recover the amounts which he was required to pay on account of the disallowances. The two causes were tried together in the court below upon an agreed statement of facts. (17 Fed. (2d) 650.)

The leases required the lessee to maintain on the premises buildings of the fair cost or value of not less than a stipulated amount (in some cases greater and in none less than the value of the existing buildings), to keep the buildings in "like condition as the same now are in," and in case of their destruction or removal from any
95 cause to replace them with buildings of the fair cost or value of a stated sum (equal to or greater than the value of the existing buildings). In some of the leases there were covenants to erect new buildings at future dates. When these suits were brought, the lessee, however, had invested nothing in new buildings, and the only expenditures that he had made on those that were on the premises when they were leased were for rents and repairs. These expenditures were deducted from his taxable income for the years in which they were made.

It is admitted that there is a natural and normal loss which continuously occurs to a building and which, despite repairs, will in the course of years exhaust it; and it is also admitted that these buildings will be entirely consumed in the lessee's business at least once and perhaps oftener before the leases expire. What the lessee seeks to do is to take care of this exhaustion by establishing an account, free from income taxes, which shall be sufficient to reconstruct the buildings when they shall have been consumed; or, stating it otherwise, he desires to deduct from the annual rental income from each of these buildings that part of the building which was consumed or used in earning this rental income. The Government's position is that this exhaustion should not be allowed because, although reflected in the

lessee's rents or gross income from the building, it does not represent exhaustion, wear, or tear of any capital that he has invested in the building.

We have examined Duffy v. Central R. R. Co., 268 U. S. 55, and other court decisions cited in argument, but do not find that any of them decides the question presented. Nor do we find from the Government's citations, including the regulations issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, that the rulings in these cases were made pursuant to any uniform departmental construction which might be said to have received legislative sanction by the passage of subsequent revenue acts. Indeed, there is no decision of the department to which, we feel, there should be given any considerable weight. There are, it is true, expressions in office decision 1014 which might be thought to be applicable, but that ruling must be treated as the department itself treats such rulings—as merely applying to the facts then under consideration.

The revenue act under which these taxes were levied permits the taxpayer, in computing net income, to set aside, tax free, "a reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for
96 obsolescence." Comp. St. Sec. 6336 1/8 g. The language of this provision would seem to prescribe but two requisites to the right of a taxpayer to this allowance: One is that the property shall have been used in his business, and the other that he is the one who must suffer and bear the burden of the loss or depreciation. This also seems true from the further point of view that the purpose of the revenue act is to tax only gain, and the amount thus allowed to be set aside is not gain, but is capital which has gone into gross income. United States v. Ludey, 274 U. S. 295. Whether it is the capital of the one who has used the property in his business or of some one else depends, of course, upon the environal facts. It is not necessarily the capital of the holder of the legal title, who, as in this case, may be protected by the undertakings of the lessee; nor is it the capital of the mere user of the property, who may be under no obligation to make restitution. It is, it seems to us, the capital of the one who is responsible for the property—the owner or the person responsible to the owner for it—and who also uses and consumes it in his business; and that means, of course, that one may not have the legal title, or may not have paid anything for the property, and still have the right to this capital deduction, since he may have an equitable interest as valuable as the property itself, or may be so obligated to the holder of the legal title to maintain or restore the property that the investment becomes his own. This is the situation of the lessee in these cases. He is responsible for the buildings, must keep them in the condition in which they were when he took the leases, and if they are consumed, as they will be in his business, or are destroyed or removed, he must replace them. For every practical purpose they are his buildings, and in our opinion they are his capital so far as they are consumed in his business.

The Government contends that to permit the lessee to take this depreciation would be to enable him to accumulate a capital investment, tax free. This, we think, is a misapprehension, because if the leases should be surrendered or cancelled when the buildings first become exhausted, the depreciation fund would be consumed in restoring them, or if they should be surrendered at some later period, when the buildings had once been replaced but had not again become exhausted, the accumulation again would be required to restore them from their partially exhausted condition. There would never, therefore, be an accumulation of capital but only a return of capital as it was exhausted. If, on the other hand, the
97 depreciation should not be allowed and the leases should be surrendered or cancelled when the buildings are exhausted, the lessee would be required to replace the buildings from rentals upon which he had paid income taxes, the effect of which would be to require him to pay taxes upon capital. We think he is entitled to the allowance.

Judgment reversed.

98 In United States Circuit Court of Appeals

Motion to stay mandate, Nos. 4930, 4931

Filed July 28, 1928

Come now the defendants herein and move the court to stay the mandate in the above-entitled cases for a period of 90 days after date when the printed opinion of the court was filed.

The defendants and the United States Government request the additional time in order to determine if the Government will apply for a writ of certiorari in these cases, and, if it decides that a writ should be applied for, to give time in which it can be done.

The peculiar circumstances of these cases and the interests of justice require this stay, because the question if writ of certiorari must be asked for, must be determined by the Government officials at Washington, and under the required procedure it must pass through a number of hands before it is finally determined. The further fact that this is the vacation period and a number of officials and their associates are away on their vacation so that it takes much longer than usual in order to have a matter of this kind determined.

The defendants and the representatives of the United States Government will expedite the matter as much as can be, and if it should be determined that the writ of certiorari will not be requested the defendants will at once notify the court so that the mandate may issue without further delay.

A. E. BERNSTEEN,
United States Attorney, Attorney for Defendants.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

FREDERICK W. DEWART,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

99 In United States Circuit Court of Appeals for the Sixth Circuit

Clerk's certificate

I, Carl W. Reuss, deputy clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the cases of J. Harry Wiener vs. Harry H. Weiss, No. 4930, J. Harry Wiener vs. C. F. Routzahn, No. 4931, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this thirteenth day of September, A. D. 1928.

CARL W. REUSS,
Deputy Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

100 Supreme Court of the United States

No. 482

Order allowing certiorari

Filed October 29, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

101 Supreme Court of the United States

No. 483

Order allowing certiorari

Filed October 29, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 33,791, 33,792. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 482. Harry H. Weiss, collector of internal revenue, petitioner, v. J. Harry Wiener. Term No. 483. C. F. Routzahn, collector of internal revenue, petitioner, v. J. Harry Wiener. Petition for writs of certiorari and exhibit thereto. Filed September 28th, 1928. File Nos. 33,791, 33,792.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. HARRY WIENER

No. ——

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. HARRY WIENER

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Harry H. Weiss, Collector of Internal Revenue, and on behalf of C. F. Routzahn, Collector of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Sixth Circuit, entered in the above cases on the 30th day of June, 1928, reversing the judgments of the United States District Court for the Northern District of Ohio.

QUESTION PRESENTED

In the determination of his taxable net income under the Revenue Act of 1918, is the taxpayer entitled to any deduction under Section 214 (a) (8) of that Act on account of the exhaustion, wear and tear of buildings occupied by him under ninety-nine-year leases, renewable forever, where such leases were acquired after March 1, 1913, and cost the taxpayer nothing except a stipulated annual rental, and where the buildings in question were not erected or paid for by the taxpayer?

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066, 1067:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;
>
> • • • • •
>
> (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; • • •.

STATEMENT

These two cases were instituted by the respondent in the United States District Court for the Northern District of Ohio to recover income taxes for the years 1918, 1919, and 1920, paid under protest (R. 12, 18), and, since they both involved the same question of law, were disposed of as a single case (R. 1, 60). Judgments were entered in favor of the Government. (R. 16, 32.) The cases were taken on writs of error to the Circuit Court of Appeals, Sixth Circuit, where they were heard together. The Circuit Court of Appeals reversed the judgments of the lower court. (R. 88.)

During the years 1918, 1919, and 1920 the taxpayer was the owner of thirteen leases for ninety-nine years, renewable forever. These leases were all acquired after March 1, 1913, and the lessee paid nothing for them. At the time the leases were made, there were standing on the premises certain buildings which had been erected by and at the cost of the lessor. These buildings were sublet by the lessee to tenants, and the income thus produced was included by him in his income tax returns for the years 1918, 1919, and 1920. (R. 35.) In calculating his net income, the respondent was allowed to deduct as business expenses all sums spent as repairs on said buildings. (R. 37.)

The covenants contained in these several leases vary. In four of them (H, I, J, and L—R. 42, 43, 44, and 45) there is a covenant to keep and maintain on the premises buildings of a specified value

In all of the leases there is a provision that in case of a destruction by casualty the buildings shall be replaced. In some cases it is specifically provided that the lessee shall furnish funds in addition to the insurance money if necessary to restore the property. In other cases it is merely provided that the insurance money shall be applied to the restoration. In seven of the leases (A, B, C, E, H, I, and L—R. 37, 38, 39, 40, 42, 43, and 45) it is provided that the destruction of the buildings does not terminate the leases. In three of the leases (D, F, and G—R. 39, 41, and 42) the lessee is obligated to erect new buildings at specified costs within specified times. In five of the leases (C, E, F, H, and L—R. 39, 40, 41, 42, and 45) the lessee is given an option to purchase. Seven of the leases (D, E, F, G, J, K, and N—R. 39, 40, 41, 42, 44, and 47) were surrendered, cancelled, or assigned.

In so far as the lessee had made any expenditures for repairs, improvements, or replacements, such expenditures were taken into account in determining his taxable income. (R. 37.)

The taxpayer claims a right to deduct from his gross income in each year an aliquot part of the value at the time he acquired the lease of the buildings standing on the leased property. This, he asserts, represents the depreciation of those buildings. The Government contends that any expenditures which he makes under the leases he may deduct, but that he can not set up a reserve to liquidate his obligations, even if such obligations were fixed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the respondent was entitled to a deduction, under Section 214 (a) (8) of the Revenue Act of 1918, on account of the exhaustion, wear and tear of buildings occupied by him under ninety-nine year leases, renewable forever, where such leases were acquired after March 1, 1913, and cost the respondent nothing except a stipulated annual rental, and where the buildings in question were not erected or paid for by him.

REASONS FOR GRANTING THE WRITS

The Circuit Court of Appeals in reversing the judgments of the District Court and in allowing the respondent to take deductions for the exhaustion, wear and tear of buildings occupied by him under long-term leases, renewable forever, has made a new application of the provisions of the Revenue Acts relating to depreciation and has, it is believed, misconceived the meaning of Section 214 (a) (8) of the Revenue Act of 1918 under which it allowed the deductions.

The decision of the Circuit Court of Appeals is not in harmony with the decision of this Court in *United States* v. *Ludey*, 274 U. S. 295, where it was held that depreciation was a deduction from original cost (p. 303), a reduction of capital assets (p. 300), since the effect of the decision below was to allow depreciation to one who incurred no original cost and had no capital invested.

The decision of the Circuit Court of Appeals is not in harmony with the decision of this Court in

Duffy v. *Central Railroad*, 268 U. S. 55, where it was held that an expense incurred by a lessee under a long-term lease in acquiring title to an old pier and replacing it by a new one could be allowed for only by taking appropriate deductions for depreciation after the expense had been incurred.

If the decision of the Circuit Court of Appeals is allowed to stand it will require a reversal of a uniform and long-continued departmental construction of the provision of the Revenue Act of 1918 here in question and similar provisions in earlier and subsequent Acts.

The proper decision of these cases is thus a matter of wide importance in the administration of the tax statutes. The principle involved will find frequent application in connection with the taxation of public utilities where properties are often operated under long-term leases providing for the maintenance of the properties. Wherefore it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Sixth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

SEPTEMBER, 1928.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio (R. 60) is reported in 17 F. (2d) 650. The opinion of the Circuit Court of Appeals (R. 89) is reported in 27 F. (2d) 200.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 30, 1928. (R. 88.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

I

DEPRECIATION IS PROPERLY ALLOWED ONLY IN CASES WHERE THE TAXPAYER HAS MADE A CAPITAL OUTLAY

It is the contention of the petitioners, relying on principles announced by this Court in *Duffy* v. *Central Railroad*, 268 U. S. 55, and *United States* v. *Ludey*, 274 U. S. 295, that an allowance for depreciation is properly made, under the provisions of Section 214 (a) (8) of the Revenue Act of 1918, only to such taxpayers as have made a capital outlay. On the other hand the taxpayer, because of the long terms covered by the leases and of certain covenants contained therein, claims the right to set up a reserve for depreciation, notwithstanding the fact that he has made no capital outlay and the further fact that his obligations under the leases are contingent and may never have to be complied with by him.

The District Court in speaking of the respondent's claimed deduction for depreciation, said (R. 62):

> • • • He is not entitled to any other or additional deduction than was given him. Inasmuch as he had no capital investment in these leases, any allowance for depreciation on buildings would be a contribution to his capital account rather than a deduction in order to prevent an inclusion of some part of his capital as income. In substance and for all practical purposes, his annual payment of rent bought only a term for one year in the several leased premises. Hence, when he is permitted to deduct the full amount of the rent paid, together with repairs and maintenance, he is made whole with respect to his net income. Any further and additional allowance by way of depreciation of invested capital would be a mere contribution.

Speaking of the contingent obligations of the taxpayer the District Court said (R. 63):

> • • • It will be time enough to consider the question of allowing depreciation, under any of the conditions above stated, when the contingency shall have happened.
>
> That such a contingency may never happen, is evidenced by the history of the leases in question, subsequent to the year 1920. It appears from the agreed statement of facts that leases D and K have been assigned to third persons with the consent of the lessor; that leases E, G, and I have been cancelled and surrendered to the lessor; and the leases N and F have been assigned or released to

> the lessor. Thus, out of thirteen leases, seven have passed out of the picture without imposing on the plaintiff the obligation to invest any capital. If he had been permitted to retain some part of the net income under the guise of a capital depreciation, he would have merely pocketed an unearned increment.

In reversing the District Court, the Circuit Court of Appeals held that depreciation, which it described as "capital which has gone into gross income" (R. 90)—

> * * * is not necessarily the capital of the holder of the legal title, who, as in this case, may be protected by the undertakings of the lessee; nor is it the capital of the mere user of the property, who may be under no obligation to make restitution. It is, it seems to us, the capital of the one who is responsible for the property—the owner or the person responsible to the owner for it—and who also uses and consumes it in his business; and that means of course that one may not have the legal title, or may not have paid anything for the property, and still have the right to this capital deduction, since he may have an equitable interest as valuable as the property itself, or may be so obligated to the holder of the legal title to maintain or restore the property that the investment becomes his own.

It is submitted that the holding of the District Court is in line with the long-continued construction of the statute by the Commissioner of Internal Revenue, while that of the Circuit Court of Appeals is

opposed thereto. The Collectors also contend that the holding of the District Court is in harmony with the holding of this Court in *Duffy* v. *Central Railroad*, *supra*, and that the holding of the Circuit Court is not.

The Circuit Court of Appeals meets the contention of the petitioners that "to permit the lessee to take this depreciation would be to enable him to accumulate a capital investment, tax free," by saying that if—

> * * * the leases should be surrendered or cancelled when the buildings first become exhausted, the depreciation fund would be consumed in restoring them, or if they should be surrendered at some later period, when the buildings had once been replaced but had not again become exhausted, the accumulation again would be required to restore them from their partially exhausted condition. (R. 91.)

But this argument does not meet the situation which would exist if the leases should be surrendered after five, ten, fifteen, or any other number of years, while the buildings are in good physical condition and needing no replacement. It seems obvious that any depreciation allowed in those years would amount to capital in the hands of the lessee which he would have accumulated tax free. The weakness of the argument of the Circuit Court of Appeals lies in its apparent assumption that the leases were bound to run at least until the first exhaustion of the buildings, whereas they might be terminated at any moment. This is shown by the fact referred to by the District Court that at the time of the trial seven of the leases

had "passed out of the picture without imposing on the plaintiff the obligation to invest any capital." (R. 63.) The remaining leases may have passed from the picture immediately thereafter. To these commanding facts the Circuit Court of Appeals gave no weight whatever.

If we suppose, as might well have been the fact, that all the leases had been surrendered at the time of the trial, how then could the Circuit Court of Appeals defend the right of the taxpayer to retain, tax free, the depreciation allowances, constituting accumulated capital, which are the subject matter around which the controversy in these cases turns? The supposed case is not different in principle from the actual cases, and the position taken by the Circuit Court of Appeals clearly appears to be erroneous.

II

CONGRESS HAS REPEATEDLY REENACTED THE PROVISION OF THE STATUTE IN QUESTION WHILE IT WAS BEING CONSTRUED BY THE DEPARTMENT AS IN THESE CASES

Beginning with the Excise Act of 1909 (Act of August 5, 1909, c. 6, 36 Stat. 11, 113) Congress provided (Sec. 38—Second) that in computing net income there should be "a reasonable allowance for depreciation of property, if any."

The Act of October 3, 1913 (c. 16, 38 Stat. 114, 167) provided (Section II–B) for the deduction of

> • • • a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business • • •.

To this the Revenue Act of 1916 (c. 463, 39 Stat. 756, 759), Section 5–Seventh, merely added the words "or trade."

The Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1067), Section 214 (a) (8), the Act here in question, provided for—

> A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

This language was repeated in the Revenue Act of 1921 (c. 136, 42 Stat. 227, 240), Section 214 (a) (8); in the same numbered and lettered section of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 270; U. S. C., Title 26, Sec. 955 (a) (8)); in the same numbered and lettered section of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 27; U. S. C. App., Title 26, Sec. 955 (a) (8)); and also in Section 23 (k) of the Revenue Act of 1928 (Act of May 29, 1928).

During all these years the Treasury Department has uniformly construed this provision to mean that the capital which is to be returned to the taxpayer in depreciation allowances is the cost to the taxpayer of the depreciable property, and that where a taxpayer has incurred no capital costs he can be allowed no depreciation.

Congress is presumed to have legislated with knowledge of this executive construction of the statute, *United States* v. *Bailey*, 9 Pet. 238, 256, and this repeated reenactment of this provision amounts "to an implied legislative recognition and approval of

the executive construction of the statute." *National Lead Company* v. *United States*, 252 U. S. 140, 146.

CONCLUSION

Because of the far-reaching effect of the opinion below, because of its conflict with the uniform and long-continued Departmental construction, and because of the manifest importance of an authoritative rule for the guidance of the Treasury Department in administering the tax statutes, it is respectfully submitted that the petition for writs of certiorari should be granted.

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SEPTEMBER, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 482

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE,
petitioner

v.

J. HARRY WIENER

No. 483

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE,
petitioner

v.

J. HARRY WIENER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio (R. 43) is reported in 17 F. (2d) 650. The opinion of the Circuit Court of Appeals (R. 59) is reported in 27 F. (2d) 200.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 30, 1928. (R. 58.) Petition for certiorari was filed September 28, 1928. Certiorari was granted October 29, 1928. (R. 62.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the determination of his taxable net income under the Revenue Act of 1918, is a taxpayer entitled to any deduction under Section 214 (a) (8) of that Act on account of the exhaustion, wear and tear of buildings occupied by him under ninety-nine year leases, renewable forever, where such leases were acquired after March 1, 1913, and cost the taxpayer nothing except a stipulated annual rental, and where the buildings in question were not erected or paid for by the taxpayer?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066, 1067:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or

other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;

* * * * *

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * *

STATEMENT OF FACTS

These two cases were instituted by the respondent in the United States District Court for the Northern District of Ohio to recover income taxes for the years 1918, 1919, and 1920, paid under protest, and, since they both involved the same question of law, were disposed of as a single case. (R. 1, 12.) Judgments were entered in favor of the Government. (R. 11, 22.) The cases were taken on writs of error to the Circuit Court of Appeals, Sixth Circuit, where they were heard together. The Circuit Court of Appeals reversed the judgments of the lower court. (R. 58.) This Court granted certiorari on October 29, 1928.

During the years 1918, 1919, and 1920 the taxpayer was the owner of thirteen leases for ninety-nine years, renewable forever. These leases were all acquired after March 1, 1913, and the lessee paid nothing for them. At the time the leases were

made there were standing on the premises certain buildings which had been erected by and at the cost of the lessor. These buildings were sublet by the lessee to tenants, and the income thus produced was included by him in his income tax returns for the years 1918, 1919, and 1920. In calculating his net income the respondent was allowed to deduct as business expenses all sums spent as repairs on said buildings. (R. 24–25.)

The covenants contained in these several leases vary. In four of them (H, I, J, and L; R. 29–32), there is a covenant to keep and maintain buildings on the premises. In all of the leases there is a provision that in case of a destruction by casualty the buildings shall be replaced. In some cases it is specifically provided that the lessee shall furnish funds in addition to the insurance money if necessary to restore the property. In other cases it is merely provided that the insurance money shall be applied to the restoration. In seven of the leases (A, B, C, E, H, I, and L; R. 26–32) it is provided that the destruction of the buildings does not terminate the leases. In three of the leases (D, F, and G; R. 27–29) the lessee is obligated to erect new buildings at specified costs. In five of the leases (C, E, F, H, and L; R. 27–29, 32) the lessee is given an option to purchase. Seven of the leases (D, E, F, G, J, K, and N; R. 27–33) were surrendered, canceled, or assigned.

In so far as the lessee had made any expenditures for repairs, improvements, or replacements, such expenditures were taken into account in determining his taxable income. (R. 25.)

The taxpayer claims a right to deduct from his gross income in each year, an aliquot part of the value at the time he acquired the leases of the buildings standing on the leased property. This, he asserts, represents the depreciation of those buildings. The Government contends that any expenditures which he makes under the leases, he may deduct, but that he can not set up a reserve to liquidate his obligations, even if such obligations were fixed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the respondent was entitled to a deduction, under Section 214 (a) (8) of the Revenue Act of 1918, on account of the exhaustion, wear and tear of buildings held by him under ninety-nine year leases, renewable forever, where such leases were acquired after March 1, 1913, and cost the respondent nothing except a stipulated annual rental, and where the buildings in question were not erected or paid for by him.

SUMMARY OF ARGUMENT

The respondent has asked that he be allowed deductions for exhaustion, wear and tear on property which required no capital outlay by him and as to which his future liability is indefinite and specula-

tive. The decision of the Circuit Court of Appeals, in allowing the deductions asked, is in direct conflict with the decision of this Court in *United States* v. *Ludey*, 274 U. S. 295. It was there determined that depreciation was a deduction from original cost. (P. 300.) As there has been no original cost in the instant case, it must follow that there can be no allowance.

Neither is the instant decision in harmony with the decision of this Court in *Duffy* v. *Central R. R.*, 268 U. S. 55. It was there held that an expense incurred by a lessee in replacing an old pier with a new one could be recovered only by taking deductions for depreciation after the expense had been incurred. Considering these two cases together, it becomes apparent that the allowance for exhaustion must await the capital expenditure.

The decision is not factually sound in that the Circuit Court of Appeals has assumed that under all the leases the taxpayer would be under obligations to replace the old buildings under lease with new buildings during the period of his leases. Neither the leases nor the other facts in the case support this premise. (R. 24–42.)

Beyond this, however, the decision of the Circuit Court of Appeals is in conflict with the long continued departmental construction of the provisions of the Revenue Act of 1918 here in question and similar provisions in earlier and subsequent Acts. Articles 164 and 165 of Regulations 45. It is also

in direct conflict with the Revenue Act of 1924, Section 204 (c) of the Revenue Act of 1926, and Section 204 (c) of the Revenue Act of 1928, which prescribe cost as the basis for the determination of allowances for depreciation.

ARGUMENT

I

DEPRECIATION IS PROPERLY ALLOWED ONLY IN CASES WHERE THE TAXPAYER HAS MADE A CAPITAL OUTLAY AND TO THE EXTENT OF ORIGINAL COST IN THE CASE OF PROPERTY ACQUIRED AFTER MARCH 1, 1913

Section 214 (a) (8) of the Revenue Act of 1918 allows as a deduction in computing net income "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business." The regulations of the Commissioner of Internal Revenue, promulgated under this and all previous Acts, provided that depreciation allowances should be computed upon the basis of the cost to the taxpayer of the depreciable property. This method was approved by this Court in the case of *United States* v. *Ludey*, 274 U. S. 295, where it is said (p. 300):

> * * * The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum

> which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide *an amount equal to the original cost. The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold.* * * *. (Italics supplied.)

The use of cost to the taxpayer as the basis for depreciation allowances is expressly provided for in the Revenue Act of 1928 (Sec. 114 (a)); in the Revenue Act of 1926 (Sec. 204 (c), c. 27, 44 Stat. 9, 16); and in the Revenue Act of 1924 (Sec. 204 (c), c. 234, 43 Stat. 253, 260).

Moreover, in this case it apparently is conceded that the proper basis for the allowance is cost to the taxpayer, the issue arising from the divergent views as to what constitutes the taxpayer's cost under the provision of these leases.

The Circuit Court of Appeals, in reversing the decision of the District Court, has allowed the taxpayer to take deductions for the exhaustion, wear and tear of the buildings occupied by him under long-term leases renewable forever. Up to the time this suit was brought the taxpayer had expended nothing on these buildings, except for repairs and maintenance charges which had been deducted by him from his income. The decision of the Circuit

Court of Appeals is based upon the long terms covered by the leases and the taxpayer's obligations, under the leases, to maintain and restore the buildings in accordance with the provisions thereof. Because of this it is concluded that the value of the buildings at the time of the execution of the leases should be considered as taxpayer's capital investment, and in so far as they are consumed in his business, he should be entitled to allowances for depreciation. (R. 60.) That court has assumed that the investment of the owner or lessor becomes the investment of the lessee, and as such is to be measured by the value of the buildings, regardless of whether the lessee paid anything for the buildings or not. From this premise it follows that the taxpayer may take allowances for depreciation which in the aggregate will suffice to *provide an amount equal to this value*. (R. 60.)

It has reasoned that, since taxpayer is responsible for the buildings and must keep them in the condition in which they were when he took the leases, he should be allowed to take care of their exhaustion by establishing an account free from income taxes in the nature of a reserve for depreciation. In other words, the Circuit Court of Appeals has taken the position that since the taxpayer is using the capital, and since, if he is to continue to use it, he must be prepared to replace it, he is entitled to depreciation. (R. 60.) This seems to amount to saying that the property is to be treated

as the lessee's because the lessee has covenanted to ultimately return the property.

The Circuit Court of Appeals does not take the position, in computing his depreciation, that the sums which the taxpayer may have to expend *in the future* are to be regarded as his cost. Nor does it hold that the cost incurred by taxpayer will be commensurate with the value of the buildings. (R. 59.) Moreover, the lessee's obligations under the leases clearly foreclose any such contention.

The allowance here is for a depreciation which is entirely anticipatory and speculative. It must clearly be distinguished from the case where the lessee has actually been required to make outlays from his own capital. In *Duffy* v. *Central R. R.*, 268 U. S. 55, this Court has said that the lessee might recover back such expenditures through depreciation. The expenditures which the taxpayer there attempted to deduct as ordinary and necessary expenses, however, had actually been made. Applying the rule there laid down, a taxpayer can not take a deduction in anticipation of a future expense and another after the expense is incurred. Yet under the theory developed by petitioners, and taken by the Circuit Court of Appeals, it would be difficult to avoid this duplication.

Neither does the decision seem to depend upon the character of the title of the lessee, who holds under ninety-nine-year leases renewable forever. It is true that by the statutes of Ohio a permanent

leasehold estate has many of the incidents of a fee simple estate. *Ralston Car Co.* v. *Ralston*, 112 Ohio St. 306; *Stephenson* v. *Haines*, 16 Ohio St. 478; *Worthington* v. *Howes & McCann*, 19 Ohio St. 66. The Supreme Court of Ohio has expressly held, however, that such an estate is not a fee simple and that the possession of the lessee is the possession of the lessor. *Rawson* v. *Brown*, 104 Ohio St. 537; *Taylor* v. *De Bus*, 31 Ohio St. 468; *Smith* v. *Harrison*, 42 Ohio St. 180. It is not believed, therefore, that the character of the lessee's title under the leases has any substantial bearing upon the principles involved in this case.

The Circuit Court of Appeals, having held that the only requisite (except that the property be used in the business) is that the taxpayer be "the one who must suffer and bear the burden of the loss or depreciation" and that the property used in the business is the "capital of the one who is responsible for the property * * * and who also uses and consumes it in his business," proceeds to the conclusion that the lessee is entitled to recover the *value* of the standing buildings because "he is responsible for the buildings, must keep them in the condition in which they were when he took the leases, and if they are consumed, as they will be in his business, or are destroyed or removed, he must replace them." This conclusion ignores the fact that, under any view of the case, the future replacement investment of the lessee is not and is never

likely to be the same as the value of the buildings at the time the leases were acquired. His investment is the cost of repairs and maintenance which he deducts. His obligation under the lease is not to return to the lessor a sum of money equal to the present value of the buildings but is to return a depreciated building having a certain value. The cost of fulfilling that obligation bears no relation to the amount which the court permits the taxpayer to set aside for its fulfillment.

II

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS IN ERROR IN ALLOWING A DEDUCTION TO BE TAKEN UNDER THE LEASES, WHEN IT WAS POSSIBLE THAT THEY WOULD NEVER REQUIRE ANY CAPITAL EXPENDITURES TO BE MADE

The conclusion which the court reaches also proceeds on an erroneous conception of the effect of depreciation. The court assumes that it will be necessary to replace the buildings *in toto* at least once and perhaps several times during the terms of the leases. In dealing with depreciation allowances it is assumed that any given capital asset will have a useful life of a certain number of years. This assumption is predicated upon the further assumption that nothing will be expended on upkeep of the property other than ordinary repairs—that no capital expenditures or replacements will be made. But each replacement or extraordinary expenditure chargeable to the capital investment partially renews it, so that, at the end of the as-

sumed useful life of the entire building, it will not have been actually consumed. Hence it does not necessarily appear that the lessee in this case will have to replace *in toto* any building. He is required to maintain from day to day the buildings in such condition that they will have a value each day equal to the value assigned to them in the lease. The lessee covenants "*at all times* during the term of this lease to maintain on the premises above described a building or buildings, *the fair cost or value* of which shall not be less" than a stated sum, the intention of the parties being "that the lessee shall keep and maintain the *buildings now on said premises* in like condition as the same now are in." (Exhibit B; R. 33, 36.) (Italics supplied.) Changing economic conditions as well as wear and tear of the buildings must be considered in determining the extent of the lessee's liability. Consequently, the cost of fulfilling this obligation can not be foreseen. Its full measure is the actual expenditure made in its performance.

And that this was the intent of the parties is clear. As quoted above, the only lease appearing in full in the record expressly says so. All of the provisions of the leases which require maintenance and which permit removal (H, I, and L, R. 29–32) point to the fact that in no case did the lessor look to the credit of the lessee. The leases provide for the payment in advance of fixed rentals. They provide that the lessee shall keep the buildings fully insured. They provide

that in the event of voluntary destruction a bond shall be given before the destruction is commenced. Clearly, then, the lessor did not contemplate that the lessee should allow these buildings at any time to become exhausted. The value must be maintained from day to day. Resultantly, if the covenants are fulfilled, the allowances made by the Commissioner for "ordinary and necessary expenses" will fully compensate the lessee for all the expenditures which he makes under this lease at the time he makes them.

The conclusion of the Circuit Court of Appeals is erroneous for the further reason that it is assumed that the leases impose certain obligations upon the lessee which in fact are not imposed. The court says (27 F. (2d) 200; R. 59):

> The leases required the lessee to maintain on the premises buildings of the fair cost or value of not less than a stipulated amount (in some cases greater and in none less than the value of the existing buildings), to keep the buildings in "like condition as the same now are in," and, in case of their destruction or removal from any cause, to replace them with buildings of the fair cost or value of a stated sum (equal to or greater than the value of the existing buildings). In some of the leases there were covenants to erect new buildings at future dates. * * *. (R. 59.)

and, based on this summary of the requirements of the leases, the court further says (p. 201; R. 60), as the reason for its decision:

> * * * He (the lessee) is responsible for the buildings, must keep them in the condition in which they were when he took the leases, and, if they are consumed, as they will be in his business, or are destroyed or removed, he must replace them. * * *. (R. 60.)

A consideration of the provisions of these leases, it is submitted, shows first that the provisions summarized do not appear in all of the leases, and secondly, that the responsibilities placed upon the lessee are not as supposed by the learned court below. The covenants of the leases with respect to maintenance, replacements, and additions fall into one of four classes:

The first class consists of covenants requiring the lessee to replace the buildings which he voluntarily tears down (all leases except J); the second class embraces those which require the lessee to replace buildings accidentally destroyed (all leases); the third class relates to the necessity of maintaining the present buildings (Leases H, I, J, L; R. 29–32); and the fourth class obligates the lessee to erect new buildings at specified costs (Leases D, F, G; R. 27–29).

Clearly under covenants of the first class there can be no obligation upon the taxpayer until he razes the building, and the assumption of this obligation is entirely optional with him. Obviously, taxpayer would not be entitled to build up a reserve to take care of these obligations under any theory recognized by the taxing laws.

The covenants of the second class, that is, those relating to the restoration of buildings in the case of destruction by casualty, are to be found in all of the leases but are varied in their terms. All of the leases (Lease E, R. 28, is, perhaps, an exception) require the lessee to keep the buildings insured. Leases A and B (R. 26) provide that the buildings shall be restored to their former condition. Leases H, I, L, and perhaps J (R. 29, 30, 31, 32) require the lessee to supply any deficiency over and above the amount of insurance received required to restore the buildings. Leases C, D, G, and N (R. 27, 29, 32–33) merely require that the proceeds from the insurance on the buildings shall be used in restoring them. Leases E, F, J, and K (R. 28, 30–31) provide that the insurance shall be paid to a trustee who shall use it in restoring the buildings. Lease J. (R. 31), since it requires the maintenance of a building of a specified value, may, perhaps, require additional expenditures. Thus under these covenants, as found in leases C, D, E, F, G, K, and N, no obligation can possibly arise requiring any investment to be made by the taxpayer. Under the remaining leases, A, B, H, I, L, and perhaps J, the obligation arises only in the event, which may never happen, of the destruction of the buildings by casualty, and then only in the case that the insurance is insufficient to erect buildings of a stated value.

The extent of the capital investment which taxpayer might be required to make under these last five leases can not be foretold or provided against in any reasonable manner. Further, since under

all the leases the insurance is to be used for replacement of the buildings destroyed, taxpayer can not be allowed to accumulate a reserve to take care of these same replacements. Still further, the lessee may have thereafter the full benefit of any expenditure he makes.

The so-called "typical lease" or Lease I, set out as Exhibit B (R. 33–42) as being *representative* of the third class, contains a covenant that the lessee agrees (R. 35–36) "at all times to keep and maintain the buildings and improvements from time to time on said premises in good repair and in proper condition and (except during the periods allowed by this lease for the repairs and alterations or for reconstruction in case of loss or damage to such buildings and improvements or for the erection or construction of a new building or buildings on said premises), at all times during the term of this lease to maintain on the premises above described a building or buildings, the fair cost or value of which shall not be less than seventy thousand dollars ($70,000), it being the intention of the parties hereto that lessee shall keep and maintain the buildings now on said premises in like condition as the same now are in and in case of the removal or destruction from any cause whatsoever of said buildings or improvements, or any part thereon, or any buildings or improvements at any time standing on said premises, that he will replace the same at his own proper cost and expense with a new building or buildings, the character and fair cost and value of

which shall not be less than one hundred thousand dollars ($100,000). * * *."

A consideration of the recitals of the other leases as set out in Exhibit A (R. 26–33) indicates that in but three others, H, J, and L (R. 29–32) are there any covenants of similar purport. Two of these leases, I and J, would seem to require replacements by the lessee as the buildings on the premises are worn out or exhausted through natural and usual depreciation. As has been pointed out, the deduction of these maintenance and replacement items is provided for in the regulations. Lease H contains no express provision for the maintenance of buildings of any specified value, and the lessee is only required to keep the buildings on the premises and those thereafter constructed "in continuous, good, substantial, and tenantable order and repair." (R. 30.) As to this last lease it can not be said that the lessee is under any obligation to replace the building as it becomes exhausted. Lease L expressly excepts from the operation of its covenants "natural depreciation." (R. 32.)

It is true that in leases A, B, C, E, H, I, and L (R. 26–32), it is provided that the destruction of the buildings shall not terminate the leases or relieve the lessee from his obligation to pay rents. (See clause "from whatever cause" appearing in Lease H (R. 30) and the clause "destruction of * * * by fire or otherwise" appearing in Lease L; R. 32.) However, these covenants do not obligate the lessee to replace the buildings, but, at most,

may only create the *practical necessity* of his having to do so in the event that the destruction occurs early in the term.

There are three leases which contain covenants of the fourth class. Lease D (R. 27) requires the lessee to erect a building worth not less than $30,000 within 20 years; lease F (R. 28–29) requires expenditures of $8,000 within 2 years and $25,000 within 6 years for new buildings, and lease G (R. 29) requires an expenditure of $10,000 for permanent improvements without specifying when the same must be expended. The amounts thus required to be expended are not respectively the same as values sought to be set aside.

It thus appears that in the case of but two of the leases, I and J, is the lessee under obligation to replace the exhaustion of the old buildings as they are exhausted, while in three others, D, F, and G, he will be obligated to erect new buildings of stated values in the future. As to both classes of expenditures, whether for replacements or improvements, the allowances, made under the regulations and in accordance with the *Duffy case, supra,* fully return to the taxpayer his capital outlay.

This was the view expressed by the District Court in its opinion, wherein it is said (R. 44):

> * * * It will be time enough to consider the question of allowing depreciation, under any of the conditions above stated, when the contingency shall have happened.

> That such a contingency may never happen is evidenced by the history of the leases in question subsequent to the year 1920. It appears from the agreed statement of facts that leases D and K have been assigned to third persons with the consent of the lessor; that leases E, G, and I have been cancelled and surrendered to the lessor; and the leases N and F have been assigned or released to the lessor. Thus, out of thirteen leases, seven have passed out of the picture without imposing on the plaintiff the obligation to invest any capital. If he had been permitted to retain some part of the net income under the guise of a capital depreciation, he would have merely pocketed an unearned increment.

The Circuit Court of Appeals expressed a contrary view in reversing the District Court by saying (R. 61) that if—

> • • • the leases should be surrendered or cancelled when the buildings first become exhausted, the depreciation fund would be consumed in restoring them, or if they should be surrendered at some later period, when the buildings had once been replaced but had not again become exhausted, the accumulation again would be required to restore them from their partially exhausted condition.

But that this latter argument does not meet the situation which would exist if the leases should be surrendered after five, ten, fifteen, or any other

number of years, is demonstrated by the fact that seven of the leases (D, E, F, G, J, K, and N; R. 27–33) were surrendered, canceled, or assigned before taxpayer was compelled to expend any of the amounts which the court allows to be set aside on account of depreciation. Thus it seems obvious that any depreciation allowed in those years before surrender amounts to capital in the hands of the lessee which he has accumulated tax free. The fact, referred to by the District Court, is that at the time of the trial seven of the leases had "passed out of the picture without imposing on the plaintiff the obligation to invest any capital." (R. 44.) The remaining leases may have passed from the picture immediately thereafter. To these commanding facts the Circuit Court of Appeals gave no weight whatever, and, we believe, placed little, if any, emphasis upon the uncertainty, in every case, and the want of legal necessity, in some cases, by which the replacements were surrounded.

As to those leases which may be or have been surrendered without any expenditure being or having been made, how could the Circuit Court of Appeals defend the right of the taxpayer to retain, tax free, the depreciation allowances, constituting accumulated capital, which are the subject matter around which the controversy in these cases turns? And how could the Government at the time of surrender contend that a taxable gain then resulted from keeping what had been previously earned and received?

The supposed case is not different in principle from the actual cases, and the position taken by the Circuit Court of Appeals appears to be erroneous, certainly as to those leases which have been surrendered and hardly less clearly with respect to those leases which at the time of trial had not been but by this time may be surrendered, cancelled or assigned.

The statute requires at most a *reasonable* allowance for depreciation, and it is submitted that an allowance which is predicated upon a value having no relation unless accidental to the actual investment required of the taxpayer is not under any circumstances a reasonable allowance.

III

THE CONSTRUCTION OF THE SECTION CONTENDED FOR BY THE COMMISSIONER HAS BEEN FOLLOWED WITHOUT CHANGE UNDER THE VARIOUS REVENUE ACTS AND THE ACTION OF CONGRESS IN REENACTING THAT SECTION AMOUNTS "TO AN IMPLIED LEGISLATIVE APPROVAL OF THE EXECUTIVE CONSTRUCTION OF THE STATUTE"

The decision of the Circuit Court of Appeals conflicts with the established departmental construction of the Act in at least three particulars:

It conflicts with Articles 161 and 164 of Regulations 45, which were approved by this Court in the *Ludey case, supra*, in that it allows the taxpayer to deduct from his income amounts said to represent the depreciation of a building in which he has made no investment. The fact, if it be a fact, that he

will have a capital investment in some other building at some later time does not seem to justify a departure from the rule established by the regulations and approved by this Court. It is not permissible to substitute value for cost under the circumstances of this case. The cost to the taxpayer is the cost of the replacement. At the time that that replacement becomes necessary it may cost much more or much less to produce a building which will have at the end of the lease a remaining value equal to the value of the building standing at the beginning of the lease.

It also conflicts with Article 109 of Regulations 45, which article embodies the rule laid down by this Court in the case of *Duffy* v. *Central R. R.*, *supra*, in that the supposed cost is set aside in anticipation of a possible future cost, and thus is not spread over either the life of the property in which the capital is invested, or the *remaining* life of the lease, whichever is shorter. This regulation denies a lessee the right to set up a reserve for estimated future costs. Office Decision 516, 2 Cumulative Bulletin 112; Office Decision 1014, 5 Cumulative Bulletin 151; *Appeal of William J. Ostheimer*, 1 B. T. A. 18; *Appeal of A. Wilhelm Co.*, 6 B. T. A. 1; *Belt Railway Company of Chicago* v. *Commissioner*, 9 B. T. A. 304; cf. *Appeal of Brevoort Hotel Co.*, 1 B. T. A. 132. But the depreciation allowance permitted here is nothing more or less than the

creation of such a reserve and a recovery over the life of a building in which no capital has been invested by the lessee.

Finally, it conflicts with Article 164 of Regulations 45, *supra*, in that it allows the *lessee* to deduct the depreciation which that Article permits the lessor to deduct. Manifestly, both persons can not be at one and the same time the owners of the capital used in the business. The depreciated cost of the improvements erected by a lessee, being income to the lessor at the time of erection, is an expense to the lessee and, as appears from the record in this case, such expense the lessee is permitted by the regulations to take. *Miller* v. *Gearin*, 258 Fed. 225, certiorari denied, 250 U. S. 667; *Cryan* v. *Wardell*, 263 Fed. 248; Article 48, Regulations 45. But no part of the capital already invested by the lessor, i. e., the cost of the standing buildings, should be recoverable by the lessee, in addition to his expenses, merely because he has a right to use the buildings. His cost is what he has to pay, not what the buildings were worth or what they cost someone else.

The provision of Article 109 of Regulations 45, to the effect that the cost of the improvements erected shall be treated as the lessee's capital investment, is likewise found in the succeeding regulations (Article 109, Regulations 62; Article 110, Regulations 65; Article 110, Regulations 69), and in the preced-

ing regulations (Regulations 33, Article 140). At the time that each of these regulations was in effect Congress passed an Act providing for a depreciation allowance in the same language as that used in the Act construed by the respective regulations. Section 214 (a) (8), Revenue Act of 1918, c. 18, 40 Stat. 1057, 1067; Section 214 (a) (8), Revenue Act of 1921, c. 136, 42 Stat. 227, 240; Section 214 (a) (8), Revenue Act of 1924, c. 234, 43 Stat. 253, 270 (U. S. C., Title 26, Sec. 955), Section 214 (a) (8), Revenue Act of 1926, c. 27, 44 Stat. 9, 27 (U. S. C. App., Title 26, Sec. 955 c; Section 23 (k), Revenue Act of 1928, c. 852, 45 Stat. 791, 800.

Congress is presumed to have passed these Acts with knowledge of the then existing executive construction of the statute (*United States* v. *Bailey*, 9 Pet. 238, 256), and its repeated reenactment of the provision, without change, amounts "to an implied legislative recognition and approval of the executive construction of the statute" (*National Lead Co.* v. *United States*, 252 U. S. 140, 146).

CONCLUSION

The decision of the Circuit Court of Appeals is in direct conflict with the regulations of the Commissioner promulgated under the 1918 Act, and earlier and subsequent Acts, and the decisions of this Court in *United States* v. *Ludey*, 274 U. S. 295; *Duffy* v. *Central R. R.*, 268 U. S. 55. It is therefore respectfully submitted that the decision of the Cir-

cuit Court of Appeals is erroneous and should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted.

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Nos. 482 and 483

In the Supreme Court of the United States

OCTOBER TERM, 1928

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

J. HARRY WIENER

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

J. HARRY WIENER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUE

The issue is the right of the respondent to take a deduction from gross income, in the process of computing net income taxable under the Revenue Act of 1918, of a reasonable allowance for exhaustion, wear and tear, including obsolescence, of buildings used by him in his

business, held by him under ninety-nine year leases, renewable forever, *the leases imposing the burden of such exhaustion, wear and tear and obsolescence upon him.*

The respondent claims that he is entitled to take such deduction. The Government denied it and collected taxes upon his net income increased by the amount of such deductions claimed by him.

THE ESSENTIAL FACTS

The brief for the petitioners discusses the facts in some detail. It is unnecessary to repeat them all here, but it may be pointed out that:

The respondent is in the business of holding property under long-term leases and subletting it for lesser terms for occupancy by or under the sub-tenants.

The leases under which the respondent holds are for ninety-nine year terms, with the option of renewing forever.

Under all of the leases, the respondent (hereinafter frequently referred to as the lessee) is obligated to pay stated rentals, and in addition, to pay all taxes, assessments, public charges and other charges, liens, penalties and the like, against the leased premises. (Reference "R" is to the printed transcript of Record.)

> "(Lease A (R 37); Lease B (R 38); Lease C (R 39); Lease D (R 39); Lease E (R 40); Lease F (R 41); Lease G (R 42); Lease H (R 43); Lease I (R 43 and R 49); Lease J (R 44); Lease K (R 45); Lease L (R 45); Lease N (R 47).)"

In the following leases, there is an express provision that loss of the buildings through any cause shall not relieve the lessee from his obligation under the lease:

"(Lease A (R 38); Lease B (R 38); Lease C (R 39); Lease E (R 40); Lease H (R 43); Lease I (R 44 and R 56 Sec. XI); Lease L (R 46).)"

Under all of the leases, the lessee is required to carry insurance, the avails from which, in the event of the destruction of the buildings, are to be used in replacing the buildings so destroyed.

"(Lease A (R 37); Lease B (R 38); Lease C (R 39); Lease D (R 40); Lease E (R 40); Lease F (R 41); Lease G (R 42); Lease H (R 43); Lease I (R 43 and 44 and also R 52); Lease J (R 44); Lease K (R 45); Lease L (R 45); Lease N (R 47).)"

Under the following leases there is a specific clause that if lessee raze, remove or improve the building, he must replace it with one having a certain measure of value referred to in the lease:

"(Lease A (R 38); Lease B (R 38); Lease C (R 39); Lease D (R 40); Lease E (R 40); Lease F (R 41); Lease G (R 42); Lease H (R 43); Lease I (R 44 and R 51 Sec. V); Lease K (R 45); Lease L (R 46 - Sec. V); Lease N (R 47).)"

In the following leases, there are specific covenants requiring the lessee to erect a new building or to make certain improvements in a stated time:

"(Lease D (R 40); Lease F (R 41); Lease G (R 42).)"

In the following leases, express covenants of per-

petual maintenance of buildings are contained in these leases:

> "(Lease H (R 43); Lease I (R 44 also R 51 Sec. IV); Lease J (R 44); Lease L (R 46).)"

The typical lease is lease I, which, as Exhibit B is set forth in full, (R 47 to 60). As to this lease, the stipulation of facts says (R 36):

> "VIII:
>
> The leases referred to as being for ninety-nine years, renewable forever, were thirteen (13) in number and the material points in the said leases are as set forth in Exhibit A hereof" (R 37 to 47).
>
> "IX:
>
> There is attached hereto, as Exhibit B, a sample form of said leases, which may be considered as typical of all the leases subject to the changes and modifications as shown in Exhibit A hereof."

As above stated, the express covenants of the lessee in the improvement and maintenance of the buildings on leased property, vary in the above leases. The express covenants, of course, are for the benefit of the lessor, who may insist on their performance, and, if the lessee fail to perform these covenants, the lessor may declare a forfeiture of the lease.

The stipulation as to lease of properties states:

> "It is further stipulated that all of the properties herein were leased by the plaintiff to various parties, each of which sublessees used the said property for business purposes, in

which business the plaintiff was not interested." (R 34).

The respondent was required under the terms of these leases, to pay rent to the lessor continuously. In order to realize this rent from the sublessees, it is obvious that habitable and suitable buildings must be kept upon the premises, or the resources from which the rents payable to the landlords of the lessee (respondent) could not be realized.

The respondent, therefore, if he would meet his overhead, namely, of paying rent to his landlords under the various leases, of paying taxes, assessments, insurance premiums, and other necessary expenses, must maintain such buildings on the leased premises as will enable him to realize rentals from these sublessees.

This economic necessity was continuous and inexorable, and even in those cases where a lease did not specifically require him, under pain of forfeiture, to maintain a building of a measured value, the necessity for such maintenance by the respondent was present, and his loss through depreciation was just as real as where there was a specific covenant in the lease for continuous maintenance.

This economic necessity, existing both in those leases where no express maintenance covenant to a required value and in those where such covenant is contained, required the respondent

1. At all times to maintain on the premises buildings which were adequate to produce sufficient revenue,

2. To restore such buildings when they were destroyed.

3. To replace buildings, when, through depreciation, they were worn out and obsolete, and therefore incapable of producing adequate revenue.

That this depreciation is not speculative is recognized in the statement of Facts: (R 36).

"VII:

It is agreed that if the Court shall find that the plaintiff is entitled to deductions under the terms of the Revenue Act of 1918 for exhaustion, wear and tear of buildings upon land held under leases for 99 years, renewable forever, the amounts to be refunded to the plaintiff are as follows:

For 1918	$ 22.78
For 1919	1283.10
For 1920	356.06

"If the Court shall find that plaintiff is entitled to judgment, judgment shall be rendered against C. F. Routzahn as collector in the sum of $409.09 with interest, and against Harry H. Weiss as collector for the sum of $1,252.85 with interest."

The lessee in filing his income tax returns, reduced his gross income by a reasonable allowance for exhaustion, wear and tear and obsolescence of the buildings so used by him in his business. The Government disallowed these deductions, increased his income accordingly, and computed additional taxes on the income so increased.

The District Court rendered judgment for the Government. The Circuit Court of Appeals reversed this judgment. The Government brings the case here on a writ of certiorari.

RESPONDENT'S POSITION

We claim that for the purpose of claiming a reasonable allowance under Section 214 (a) (8) of the Revenue Act of 1918, reference should be made to the exhaustion, wear and tear and obsolescence of all property used in the business, whether title be in the lessor or the lessee, whether the lessee has previously paid for such property or must pay for it in the future, *so long as the burden of making good that exhaustion, wear and tear, and obsolescence is upon the lessee.*

SUMMARY OF ARGUMENT

I. Depreciation is allowed to a taxpayer out of current income, otherwise the investment which produces that income will become exhausted. *United States v. Ludey*, 274 U. S. 295.

> The proceeds of a sale of goods represents a return
>
> 1. On the materials entering into the production,
>
> 2. On labor that has been applied to goods, including the effort of executives and salesmen,
>
> 3. On the proportion of the value of the machinery,
>
> 4. On the buildings, which is consumed in the manufacture of the product; and
>
> 5. In some cases, on a proportionate part of the monopoly granted, as patents, existing during the period of production.

The manufacturer must recover these elements of basic value before he has received income upon the sale. It will be shown in this argument, that a lessee under a ninety-nine year lease renewable forever, who

sublets the buildings on the leased property "sells" to the sublessees, a composite of various elements, among which is the depreciation of the building which is consumed in the business of renting, over a period of years, just as the machinery and buildings of the manufacturer are consumed in the process of manufacturing the product which is sold.

II. The Deduction Should be Allowed to the Taxpayer Who Must Bear the Loss. The annual depreciation of a building on a perpetual leasehold, causes loss to the lessee, not to the lessor. Rentals are fixed in leases of this type, on the assumption that the lessee will pay rent continuously and the lessor is not concerned with the maintenance of the buildings.

III. For the Purpose of the Tax Law, the Lessee is the Owner. *Ralston Steel Car Co.* v. *Ralston*, 112 Ohio State 306.

A. Every Reason for Allowing the Deduction to an Owner Operating His Own Property, Applies Equally to the Lessee in the Present Case. As with an owner, a part of the revenue received from a building which a tenant under a perpetual leasehold sublets, reimburses the owner or lessee for a part of the capital which is lost by depreciation in the year when the revenue was produced. This reimbursement from revenues is a recovery of capital. It is not income.

B. Every Reason for Denying a Reduction for Depreciation to a Lessee Would Apply Equally to an Owner. If an owner sells a building before he has replaced a depreciated building, he will receive a diminished purchase price. If a lessee under a permanent leasehold sells his leasehold

> rights, before he has restored a depreciated building, he receives less for his leasehold than if the building had been restored. If the lessee under permanent leasehold surrenders his lease to the lessor, and the building on the property is depreciated, in some way or other he will have to account to the lessor for the amount of depreciation. Otherwise, the lessor may hold him to his bargain, namely, continuously to pay rent.

IV. There is No Authority for the Government's Position. The cases cited by the Government are not authority for the proposition for which they are cited and the interpretation which the Government has placed upon the cases upon which it relies, is not borne out by the facts.

ARGUMENT

I.

NATURE OF "DEPRECIATION"

The Revenue Acts and the Treasury Regulations thereunder have uniformly recognized the necessity of an allowance for "depreciation" in determining taxable income. Gross receipts are not all income. Only after gross receipts have been reduced by the capital return represented therein and the expenses of obtaining them can any *gain* be determined. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179. And only *gain* is income within the meaning of the Sixteenth Amendment to the Constitution. *Eisner* v. *Macomber*, 252 U. S. 189.

The deduction from gross receipts for "depreciation" was recognized by this Court under the tax laws of 1864 and 1866. *Little Miami, etc. R. Co.* v. *U. S.*, 108 U. S. 277.

In the Corporation Excise Tax Act of 1909, it was provided:

> "Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * *, received within the year from all sources, * * * (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any * * *."

The 1913 Act provided (Sec. G (b)) for a deduction of:

> "(Second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any * * * *."

The 1916 Act used the same words with respect to losses (Sec. 12 (a) second), but continued:

> "including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade;"

The 1918 Act separated this deduction from that for losses, providing (Sec. 214 (a) 8) for the deduction of:

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business including a reasonable allowance for obsolescence."

It should be noted that although the term "depre-

ciation" disappeared with the Act of 1913, and the deduction was separated from that for losses in the Act of 1918, the thought underlying the allowance of the deduction was the same throughout all the acts, with the exception that depletion was not provided for in the Excise Tax Act of 1909 and was included by the use of the term "exhaustion" in the later revenue acts (*Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364;) as well as by specific reference.

Treasury Regulations 45, promulgated under the Revenue Act of 1918, contained the following:

> "Article 161. *Depreciation.* A reasonable allowance for the exhaustion, wear and tear and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a consistent plan by which the aggregate of such amounts for the useful life of the property in the business will suffice, with the salvage value, at the end of such useful life to provide in place of the property its cost, or its value as of March 1, 1913, if acquired by the taxpayer before that date."
>
> "Article 162. The necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to

> wear and tear, to decay or decline from natural causes * * * . Property kept in repair, may, nevertheless, be the subject of a depreciation allowance * * * * * ."

This Court, in *Von Bombaugh* v. *Sargent Land Co.*, 242 U. S. 503, interpreting the Act of 1909, said:

> "What was here meant by depreciation of property? We think Congress used the expression in its ordinary and usual sense as understood by business men. It is common knowledge that business concerns usually keep a depreciation account, in which is charged off the annual losses for wear and tear, and obsolescence of structures, machinery, and personalty used in the business."

The same thought was well expressed in *San Francisco, etc., Co.* v. *Scott*, 253 Fed. 854, 855, where the court said:

> " 'Depreciation' as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

The allowance is to cover the lessening in value which cannot be made good by ordinary repairs and minor replacements, the cost of which is separately deducted from gross receipts under different provisions of statute and regulations.

The theory of allowing the deduction is that in the

use of the property, a gradual sale of it is made. The Board of Tax Appeals in discussing the nature of and reason for this deduction in *Appeal of Even Realty Co.*, 1 B. T. A. 355, 359, said:

> "When a manufacturer sells his product he is really selling a composite of four or five things: (1) The materials entering into the product; (2) labor that has been applied to them, including the effort of executives and salesmen; (3) that proportion of the value of the machinery and of (4) the buildings which is consumed in the manufacture of the product, and (5) in some cases a proportionate part of the monopoly granted by patents, exhausted during the process of production. Until the manufacturer has recovered the cost or basic value to him of the proportionate parts of these items attributable to a unit of his product sold, he can not properly be said to have received income upon its sale, and only the excess of the sale price realized over the sum of these items (whatever particular form they may take) is truly income. We feel that this would be true whether the statutes made any specific provision for their deduction or not—the computation would be just as necessary to the determination of true income as the computation of profit on a sale by reference to the cost or basic value of the article sold. As the Supreme Court said in *Doyle* v. *Mitchell Bros. Co.*, *supra* (247 U. S. 179), at p. 188:
>
> "'It may be observed that it is a mere question of methods, not affecting the result, whether the amount necessary to be withdrawn in order to preserve capital intact should be deducted from gross receipts in the process of ascertaining gross income, or

> should be deducted from gross income in the form of a depreciation account in the process of determining net income. In either case the object is to distinguish capital previously existing from income taxable under the act.'
>
> "Because of the difficulty of attributing to each article sold or to the sales in a taxable year an exact sum representing the proportion of basic value of machinery, buildings, patents, etc., entering into such sale, the statutes have consistently provided for a *reasonable allowance*. • • • "

This opinion was cited by this Court in *United States* v. *Ludey*, 274 U. S. 295, where the Court confirmed the Board's reasoning in the following terms:

> "The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. The theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold. • • •
>
> "Such being the rule applicable to manufacturing and mercantile businesses, no good reason appears why the business of mining should be treated differently."

That the deduction of an allowance for "depreciation" is essential in the computation of taxable income was settled beyond discussion by this Court in *Knoxville* v. *Knoxville Water Company*, 212 U. S. 1, 13, where it said:

> "Before coming to the question of profit at all, the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public."

The suggestion made by the Government under the second point in its brief that the Circuit Court of Appeals erred in assuming that depreciation would occur and that replacements or extraordinary expenditures chargeable to capital investment would partially renew it, constitutes an attack on the Government's own definition of depreciation as contained in Articles 161 and 162 of Regulations 45. There is no dispute as to ordinary repairs. The Government has allowed their deduction. Replacements and renewals, however, cannot be made from day to day although the depreciation which necessitates them does occur from day to day.

It is true that the lessee has contracted to maintain

the property in the condition in which it was received. But what does that mean? Does it mean that every time a thousandth of an inch of the surface of a floor is worn off, the lessee must make replacement? Does it mean that roofs must be repainted after every rain? Does it mean that if a certain building has a normal life of fifty years, it must be replaced every day, or every year, or every ten years? Certainly not. But the wear and tear goes on from day to day, and nobody can say that any building in use is in the same condition today that it was a month ago.

If a building with a fifty-year life were taken over, new, under a lease, and after a year the lease were terminated (e. g., for default in rentals), would the lessee have to replace it with a new building, and keep or sell the materials of the old? No court would make any such requirement. Equity does not grant specific performance of such contracts. The contract would be held to mean that the lessee is responsible in money damages for the difference between the value of the building returned and the value of a new building.

II.

THE DEDUCTION SHOULD BE ALLOWED TO THE TAXPAYER WHO MUST BEAR THE LOSS.

It should be noted that neither the statute nor the regulations (see pp. 10 and 11, supra) indicate that the allowance is restricted to the person who holds legal title to the property, the person who owns the property, the person who has paid for the property, or the person who has made a prior investment in the property. The deduction is allowed by reference to "*the property used in the trade or business.*"

This is because it would be wholly illogical to re-

strict the deduction otherwise than as actually done by statute and regulation.

To restrict the deduction to the holder of legal title to the property would be absurd—for legal title is frequently held merely as security for the payment of money or the performance of some other contractual obligation. A mortgagor, using up machinery or buildings in his business, should not be denied a depreciation allowance, merely because legal title to the property is vested in the mortgagee. One who has purchased property on credit and uses it up in his business should not be denied the allowance because he has not paid for it in full. He has made himself responsible for payment, and the revenue he receives from the use of the property includes a proportionate part of its cost, whether he has prepaid that cost or promised to pay it in the future.

The Treasury Department has never hesitated to allow depreciation to mortgagors or to purchasers on credit. The use of the word "cost" in the statute and regulations has never been held to mean prepaid cost or prior investment by the taxpayer in such cases. Nor could this Court have so intended to use the word "cost" in the opinion in *U. S.* v. *Ludey*, quoted above (p. 14).

The right to the deduction is based upon the use of the property in the business—the language of the statute and the regulations, and common sense indicate this. Obviously the statutory words "used in the trade or business" mean the trade or business of the taxpayer claiming the deduction, not the trade or business of another.

When A leases property to B under such circum-

stances that B pays nothing but a fixed rental for the property, and A must make good the depreciation out of rents received, the property is used in A's business of renting property. The deduction should be allowed to A. This occurs in ordinary short term leases. If A owns land worth $50,000 and a building thereon worth $100,000, having a normal life of 50 years, and leases it for three years to B, he will exact a rent (depending of course on market conditions) of about $15,000. He arrives at this figure by adding together:

6% on $150,000 investment	$ 9,000
Estimate for real property tax	2,500
Estimate for current repairs	1,500
Reserve for depreciation	2,000
	$15,000

B will pay $15,000 rent and will deduct it all from his receipts from operating the building, in computing his taxable income. In effect he will be paying for the depreciation and will be allowed to deduct it. But A, receiving $2,000 for depreciation as part of his "rent" will deduct that amount from his gross receipts as a depreciation allowance; in computing his taxable income.

But if A leases to B on terms similar to those in the case at bar (common enough in long term leases) he will exact a "rental" of only $9,000, representing merely six per cent on his $150,000. B will agree to pay not only the $9,000, but also:

the real property tax	$2,500
current repairs	1,500
depreciation	2,000
	$15,000

To be sure he does not agree to pay the $2,000 for depreciation in each year, but he agrees to replace the building when it is worn out with one equally good *and equally valuable*, and the expected cost of it, spread over the life of the building he is using up, will amount to $2,000 a year, which he will set aside out of his receipts from the operation of the building in the form of a depreciation reserve. The cost of the building is part of the consideration he must pay for the right to occupy it and to use up its value. The fact that he will actually disburse it at the end of fifty years, rather than currently, is no reason why, under sound accounting, he should not attribute that cost ratably to the years in which he is in effect *selling the building*.

The building is obviously used in B's business. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171. B is the man who must pay for the depreciation. He should be allowed to pay for it out of his receipts from its sale, *as he sells it*. Only in this manner can he fairly reflect his annual income—for so much of his receipts as represent a return of the capital value of the building *are not income*.

There is no sound reason why B's annual deduction for rent (consideration for the use of the building) should be $15,000 in case of the short term lease but his aggregate deductions for the consideration he must pay for the use of the building under the long term lease should be only $13,000, when actually he pays the same under each.

The Government in its brief suggests that the depreciatiop deduction must be allowed to the lessor, and therefore cannot be duplicated in computing the lessee's income. The author of that brief was apparently

unaware of the fact that the Treasury Department regularly (and rightly) refuses to allow lessors any depreciation deduction where the lessee undertakes to make good the depreciation. That the Treasury is right in refusing this deduction to the lessor is obvious, for the lessor should not be allowed a deduction for a loss for which he will receive full restitution, or for a return of capital which will be restored to him by the lessee.

A common form of long term lease is that made between railroad companies. The lessor company turns over its entire property to the lessee for a long term —much longer than the life of any of the buildings, roadbed, or rolling stock. It receives a net rental in the form of dividends on its stock—which are *all income*. The lessee pays for repairs, taxes, and depreciation (through replacement). The property is used in the business of the lessee, and in its business *only*, for the lessor ceases to be "in business" (*Minehill & Schuylkill Haven R. C. Co.*, v. *McCoach*, 228 U. S. 295.) The lessor certainly could not claim a deduction for depreciation of property used in its business when it is not in business, nor *should* it be allowed a deduction from the dividends paid on its stock which are 100% pure income.

The Corporation Excise Tax Act of 1909 and the Revenue Acts of 1913 and 1916 classified the depreciation deduction with *losses* (see quotations on p. 10, supra). The more recent view is that it represents a return of capital. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179; *U. S.* v. *Ludey*, 274 U. S. 295. But under either view the result should be the same. If the deduction be regarded as one for a loss, it should be allowed to the

one who must stand the loss. If it be regarded as a return of capital, it should be allowed to the one who must make good the capital.

Even if we admit for the purposes of argument that the capital recovered is that of the lessor and not that of the lessee, that part of the gross receipts from operating the building which represents proportionate cost as the building is sold (applying the reasoning of the *Ludey* case) is not income at all. And it should be eliminated from taxable income either in the process of computing gross income from gross receipts or in the process of computing net income from gross income. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179. If A pays $100 for an article and authorizes B to sell it for him, and B sells it for $120, the $100 is not income to anybody, regardless of how the $20 gain may be divided between A and B. Nor would the $100 be income to B if A allowed him to retain it for the purpose of investing it in a new article to be returned to A at the end of a stated period. And the situation is not changed if the sale by B is to be made over a period of years rather than all at once.

The taxability of income to the person to whose benefit it accrues is not dependent upon the ownership of the capital from which the income is derived. Nor, if it is derived from labor, upon the personal performance of that labor. A may rent B's capital or hire B's services and make income therefrom upon which he will be taxable. There is no reason why deductions should follow a different rule. The test of whether A can claim a deduction for depreciation should not depend upon his title to the depreciating capital, but upon whether it is used in his business and whether

the wear and tear or obsolescence of the capital actually does reduce his income.

A position similar to that taken by the Treasury Department was at one time taken by it with respect to depletion. Form AM-M-MS, entitled "Schedule for Depletion, 1909 to 1917," declared that under none of the Acts of 1909, 1913 or 1916 was a lessee entitled to deduction from income on account of depletion (see *Lynch* v. *Alworth-Stephens Co.*, 294 Fed. 190, 195). This rule was arbitrary and without foundation in law, for the statutes made no distinction between owners and lessees. This Court held (*Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364; 45 Sup. Ct. 274) that lessees were entitled to deduct depletion. This Court further held that while "depreciation" under the Corporation Excise Tax Act of 1909, did not necessarily include depletion of mines, under the 1916 Act the term "exhaustion" did include depletion, further reference to depletion in the statute being for the purpose of limiting the amount of the deduction allowable. It follows that what is true of depletion—i. e., that it may be taken by a lessee—is true of "exhaustion" generally, or of "wear and tear" which is treated identically by the statute. As this Court said in *U. S.* v. *Ludey*, 274 U. S. 295: "In essence, the deduction for depletion does not differ from the deduction for depreciation."

The Government, in its brief, has spent a great deal of time in discussion of the terms of the leases; see brief pages 14 to 19 inclusive. The Government in this summary, has considered only one feature of the obligation of the lessee under a ninety-nine year lease renewable forever. We submit that this obligation is of two kinds:

1. Express covenant in a lease to restore buildings or to maintain them of a stated value, under pain, in case of the non-performance, of the forfeiture of his leasehold,

2. That obligation which rests upon every lessee in a lease of this kind, regardless of the express covenants to maintain buildings or to restore them to a stated value, of paying the annual rate to his landlord, in a case such as is presented in the two actions under consideration.

This latter obligation is one which creates a constant economic necessity upon the lessee, to keep the buildings on the leased premises in such condition that they will constantly produce an adequate revenue so that he may

1. Pay the rent to his landlord,
2. Pay the taxes and assessments,
3. Pay insurance premiums,
4. Pay for repairs and upkeep of the building and any other miscellaneous expenses, and
5. Provide for a sufficient return so that he may ultimately replace the buildings, and
6. Provide for a profit to the lessee under the permanent leasehold.

It is submitted that it is only under heading "6" that income is produced. One to four inclusive are current expenses. Five is his return of capital. It is necessary for the lessee to realize one to five inclusive before he has any profit at all. He must keep up the buildings and if they are destroyed or become obsolete or depreciate so as to be unfit for subletting, the lessee will then be unable to meet his obligations under items one to four inclusive. The lease requires him perpetually to

meet items one to four inclusive. He is then under the economic necessity of providing for item five and unless he does, he will face an annual deficit. His revenue, then, should be adequate to enable him ultimately to build a building to replace the one which is suffering depreciation. This economic necessity is as much an obligation as if it were both in the form of a covenant, and contained in the lease in such form as to enable the lessor, if there be a breach of covenant, to declare a forfeiture of the lease. The lessee under a ninety-nine year lease renewable forever, is under the same obligation to restore the buildings which depreciate, whether the lease specifically requires him to maintain buildings of a given value or not. He is required perpetually to pay rent under all hazards, whether the building is destroyed, depreciates or not. Business judgment therefore requires that he provide against depreciation.

The Government states on page 12 of their brief, "The decision of the Circuit Court of Appeals was not correct in allowing a deduction to be taken under the leases when it was possible that they would never require any capital expenditures to be made." This is a fallacious statement. It would not be possible to conceive of a case where, in the course of years, the lessee under a perpetual leasehold might be relieved from the necessity of making capital expenditures. As long as the lease requires him perpetually to pay rent and as, in this case, his revenue is from a business involved in subletting the leased premises, the tenant for ninety-nine years renewable forever, can never relieve himself from the obligation of making such capital expenditures as are necessary to restore the premises when they have depreciated. Otherwise, he faces

ruin. What the Government meant to say, was that, in some of these leases, there was no covenant on the part of the lessee to maintain buildings of a stated value. Of course, if there is no such covenant, the lessor cannot forfeit the lease for non-maintenance of values nor for non-restoration of buildings. However, a tenant who is required perpetually to pay a stated rent which, as in this case, is to be obtained from the business of subletting, is under the same duty to himself to maintain the earning power of the buildings on the premises, as the owner in fee simple is under a duty to himself to maintain the earning power of the buildings upon premises which he owns in fee. To say that it might not be necessary that the lessee restore the buildings, is to ignore the physical facts of wear, tear and change.

III.

FOR THE PURPOSES OF THE TAX LAW THE LESSEE IS THE "OWNER."

As we have shown above, legal title in the taxpayer is not a prerequisite of the deduction for depreciation, otherwise it could not be allowed to mortgagors, or to conditional purchasers where title is in the vendor. If we assume for purposes of argument that the deduction can only be allowed to a beneficial owner, we are immediately confronted by the question of who is the beneficial owner under a lease for a term longer than the life of the depreciable property. A mortgagor remains the beneficial owner so long as he lives up to his covenants and avoids foreclosure. The lessee for ninety-nine years (renewable forever) of a building having a life of fifty years, is just as much the benefi-

cial owner as the mortgagor. So long as he pays his rent and otherwise performs the obligations of his covenants, he is entitled to possess the property, to use it and to use it up, and he is saddled with all the burdens of ownership. By the terms of the lease he has assumed the payment of the taxes on the property, he has assumed the risk of the destruction of the buildings by fire or storm, and he has assumed the loss resulting from the gradual effects of the elements as well as wear and tear. So long as a mortgagor meets his obligations, he is the beneficial owner of the property. So long as this lessee meets his obligations, he remains the beneficial owner of the buildings—for a term longer than their life.

These buildings are located in Ohio, and the Ohio courts regard the lessee under a lease of this character as the owner of the property. See *Ralston Steel Car Co.* v. *Ralston*, 112 Ohio State 306.

The Supreme Court of Ohio said in *Stevenson* v. *Haines*, 16 Ohio State 478, that the legal effect of such a leasehold

> "is to pass to the grantee an estate in fee simple, subject to be defeated by the non-payment of annuities denominated in the instrument 'rents and charges' * * *. In other words, the transaction was equivalent to a sale and conveyance, with a mortgage to secure the payment of the purchase money."

There are many other cases in the Ohio reports to the same effect, but, since they are all summarized in the *Ralston* case, we shall not detail them here. That the Ohio courts are not unique in this holding can be

seen by comparing *Crowe* v. *Wilson*, 65 Md. 479, 5 Atl. 527.

In *Putzell* v. *Drovers etc. Bank*, 78 Md. 349, 28 Atl. 276, the court said:

> "It is well settled that the holders of such leases have the absolute control and management of the property; they usually have, in point of fact, far more valuable interests in it than the reversioner who holds the estate of inheritance."

Under general tax laws providing that property should be taxed to owners thereof, it was held that the lessee and not the lessor was the owner. *Ocean Grove Camp Meeting Association* v. *Reeves*, 79 N. J. Law 334, 75 Atl. 782 (aff'd 80 N. J. L. 464, 79 Atl. 1119); cf. *Anderson* v. *Morris* and *Essex R. R. Co.*, 216 Fed. 83, 91; *Black* v. *Delaware Raritan Canal Co.*, 24 N. J. Eq. 455, 465; *Brainerd* v. *Colchester*, 31 Conn. 407.

Tiffany, Landlord and Tenant, section 221, page 1523, quotes from *Gray, Rule against Perpetuities*:

> "Estate for years, with a perpetual covenant for renewal, is, so far as questions of remoteness are concerned, substantially a fee, and as such it is so regarded."

For many different purposes the term "owner" is applicable to a lessee (see 29 Cyc. p. 1549, and particularly Note 28). We submit that the computation of income taxes is one of those purposes, where the circumstances are such as appear in this case.

A.

EVERY REASON FOR ALLOWING THE DEDUCTION TO AN OWNER OPERATING HIS OWN PROPERTY APPLIES EQUALLY TO THE LESSEE IN THE PRESENT CASE.

An owner of property, using it up in his business, must recover its cost or other basic value *as he uses it up*, and not when he gets it, when he pays for it, when he finishes using it up, or when he replaces it. This necessarily follows from the theory of the *Ludey* case. The consumption of property in lucrative business constitutes a gradual sale of the property. The sale price received includes a return of the capital. The capital is returned over the entire period of use, and should be excluded from taxable income ratably as the receipts from its use come in. Even if an owner keeps his accounts and makes his tax returns on a strict basis of cash receipts and disbursements he is required—always was required by the Treasury Department even before the *Ludey* decision—to *capitalize and depreciate* his capital assets. He is never permitted to charge them to expense at the time of acquisition or at the time of disposition, for to allow him to do so would not properly reflect his income.

If a man buys a machine with a five year normal life for $5,000, he will not be allowed to deduct $5,000 in that year. Nor will he be allowed to ignore depreciation and on selling it at the end of the fourth year for $1,000, take a deduction of $4,000 all in one year. That was in effect what was attempted in the *Appeal of Even Realty Co.*, 1 B. T. A. 355, referred to by this Court in the *Ludey* case, 274 U. S. 295 at 300.

The reason for not only allowing but compelling an owner to charge off his capital as he uses it up is be-

cause part of his receipts in each year constitute a return of capital, which is *not* income. And the rule is the same whether the owner has paid for the capital asset or is going to pay for it, whether title is in him or in his vendor or in a mortgagee. Whether the depreciation be regarded as a loss or a recovery of capital, it occurs gradually throughout the use of the property, and must be ratably deducted from receipts.

And this is equally true whether the taxpayer reports on a cash basis or an accrual basis. In the courts below the Government made a point that it did not appear of record that the taxpayer reported on an accrual basis. If he had been an owner instead of a lessee, the Treasury would not have permitted him to report any differently on one basis than on the other. We submit that it makes no difference in the case of a lessee.

If an owner, regardless of his bookkeeping method, must "depreciate" his property as he uses it up, regardless of when he makes the investment, we submit that the same should be true of a lessee.

If an owner bought property, to be paid for at the termination of its useful life, giving security for payment, he would not be allowed to take a single deduction at time of payment.

The reason given is that the lessee has made no prior investment. No prior investment is required of an owner who bought on credit, or who acquired his capital by gift or inheritance.

The owner is not allowed to charge to expense all in one year a capital asset the value of which will come back to him through gradual sale over many years. The reason given is that such accounting will not fair-

ly reflect income—his receipts for all the years will include returns of capital which should be excluded from income, and his outgo in the year of payment will include a *capital* item not a proper charge against that year's income. There is no difference in the case of the lessee.

To say to a lessee of a $100,000 building that he must pay taxes on $2,000 recovery of capital in each of forty-nine years, and then take a deduction of $100,000 in the fiftieth year against an income of maybe $10,000, is obviously unjust. He will show no tax for the fiftieth year. Suppose (as under present statutes) he can carry his net loss over the two following years, and wipe out say $10,000 of income in each year, he will still have a net loss of $70,000 for which he can get no credit. He will have been taxed on $70,000 of capital recovered in the first 49 years. This tax will have been levied without apportionment, in violation of the Constitution. *Eisner* v. *Macomber*, 252 U. S. 189, 206.

B.

EVERY REASON FOR DENYING A DEDUCTION FOR DEPRECIATION TO A LESSEE WOULD APPLY EQUALLY TO AN OWNER.

The principal reason given by the Government for its position is that the lessee has made no investment in the property which is wearing out. Many Owners acquired their property by gift or inheritance, making no investment, but under the Revenue Act of 1918 they were allowed depreciation deductions on the basis of the value of the property at time of acquisition. Many other owners acquired property prior to 1913 for a small fraction of the value at March 1, 1913, but their

depreciation is computed not on investment but on the value at March 1, 1913. Others acquired property on credit and paid for it as they used it up or after using it up. Their depreciation deductions were allowed without reference to prior investment.

The Government thinks that justice will be done by allowing the lessee to deduct the entire cost of a building in the year of its replacement. Why would this not be equally true with an owner?

If a lessee had so many buildings under lease that he had to rebuild one or more every year at a fairly constant annual cost, his deductions for replacements (under the Government's theory) would approximate his deductions for depreciation under our theory, and possibly no injustice would result to him from the application of the Government's theory. But the same would be equally true of an owner of many buildings—nevertheless we have no doubt that the decision in the *Ludey* case would be applied to such an owner if he attempted to charge off the entire cost of one of his buildings in one year.

The Government suggests (and its suggestion was followed by the District Court) that the lessee's liability for depreciation is *contingent*. It is pointed out that several of the respondent's leases were surrendered between the taxable years under consideration and the trial in this case. But the Treasury Department has always held that subsequent events have nothing to do with the computation of depreciation for a given year.

Suppose an "owner" bought a building on credit, giving a mortgage for substantially all of the purchase price. He would be allowed depreciation regardless of

the fact that he might default and reconvey (in lieu of foreclosure) without paying for the property, or that he might sell at a profit and pay his vendor out of the proceeds—or regardless of the fact that he had so defaulted or sold before finally settling his income taxes for the years he held the building. In such case he would have a taxable gain on selling or surrendering the building which would in effect include the depreciation reserve which then became income to him (*Appeal of Even Realty Co., supra*) for his "cost" would be reduced by the depreciation accrued. (*U. S. v. Ludey, supra*). The possibility of sale by an owner before his building is used up is in effect identical with the possibility of assignment or surrender by a lessee. Why does not the Treasury deny depreciation to owners until this "contingency" is resolved?

If the lessee in our case surrendered leases without turning over his depreciation reserve to his lessors it was probably because an increment in the value of the leases made the lessors glad to accept surrender on those terms. The surrender, and retention of the depreciation reserve would constitute a realization by the lessee of that increment, on which, for all the record shows, he paid income taxes—if he did not he should have. Similarly if he sold the leases to third parties.

The suggestion was made below that if the lessee were permitted to charge depreciation currently under Section 214 (a) (8) of the Revenue Act of 1918, he might later claim a deduction for replacements under Section 214 (a) (1) and thus duplicate the deduction. But it would be equally easy for an owner to take a deduction under Section 214 (a) (8) and later another under Section 214 (a) (6). There is no more reason for

misinterpreting the statute and doing injustice because of the possible future dishonesty of a lessee than of an owner.

IV.

THERE IS NO AUTHORITY FOR THE GOVERNMENT'S POSITION.

The opinion of the Circuit Court of Appeals in this case seems to us well reasoned and sound. In the absence of controlling decisions by this Court or conflicting decisions by other Circuit Courts of Appeals, it certainly is entitled to more weight than the decision of the District Court or any decisions of the Board of Tax Appeals or the Bureau of Internal Revenue.

But the Government claims that it conflicts with expressions by this Court in *Duffy* v. *Central Railroad of New Jersey*, 268 U. S. 55, and *U. S.* v. *Ludey*, 274 U. S. 295. We submit that both of those decisions favor our contentions.

In the *Central Railroad of New Jersey* case this Court held that the lessee could not charge additions and betterments to expense in the year in which they were paid for, indicating that they should be written off by annual charges for depreciation. While we fail to see the parallel between an addition or betterment, and the replacement of an outworn building, used up in the lessee's business, we are willing to accept it for the purposes of argument. If the additions are written off over a term of years, any replacements of them will be made out of the depreciation reserve, and *not* charged to expense at time of replacement—otherwise there would be a double deduction. If our lessee is supposed to follow the same rule and charge off replacements by

annual deductions over their life, he cannot also charge their entire cost to expense at the time of replacement. The Government would have him use up one building without any deduction, replace it without deduction (if the *Central Railroad* case applies) and then recover the cost of the second building through depreciation. But the money he spent for the second building and recovered by depreciation would have to be put into a third building for him to surrender at the end of the lease. He would spend it for himself but recover it for his lessor. At best he would have a deduction for loss at the end of the lease for the cost of one building—a deduction with no income to deduct it from. He would have paid taxes on capital as shown above at pp. 13 and 14.

If the Government's idea is that he could deduct the entire cost of the first replacement in one year, and then also take depreciation over the life of that building (which depreciation fund would of course eventually go back to the lessor), he would still be in the position of losing the benefit of the greater part of his deduction for replacement through having insufficient income in that and the next two years to offset it. And he would have paid taxes on all the capital recovered in the first forty-nine years.

The Government quotes from the *Ludey* case the words:

> .... The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the use-

> ful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide *an amount equal to the original cost. The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold.* * * *." (Italics supplied in Government's brief.)

The words "original cost" and "the cost of the part which has been sold" are relied on as indicating that there must have been a previously paid cost to the taxpayer claiming the deduction. Of course the Court was dealing with a case not involving the question of *whose* cost it might be. The taxpayer in that case was the owner and had paid for the property. Had the owner acquired the property by inheritance or gift, we have no doubt the Court would have referred not to cost, but to basic value—the value at time of acquisition of the capital asset it found him to have sold gradually. If he had bought the property on credit and not yet paid for it, we have no doubt the Court would have regarded the price he had contracted to pay as the capital to be recovered by depletion and depreciation allowances. In our case each building had a determinable value at the time the lease was made. The lessee contracted to maintain that value and to restore to the lessor a building of that value (in some of the leases a considerably greater value). That value was the value to him of what he was gradually selling. To that extent he entered into possession of property for the purpose of selling it. The ratable proportion of that value he sold in each year was what he regarded as a recovery of capital and claimed as a depreciation

deduction. The very theory of the *Ludey* case—that the use of a building in business is a gradual sale of the building—is directly opposed to the Government's theory and is the basis of ours. The sale of a capital asset (whether paid for or not, whether owned or leased) involves a recovery of capital, which must be deducted, in the computation of income, *as the sale takes place*, from the receipts on sale.

The Government refers to several decisions of the Board of Tax Appeals. We regard them all as distinguishable but do not wish to burden this Court with the distinctions—for even if they were in point and adverse to our contentions we should merely urge that, on the reasoning we submit, they must be overruled. In one of them, *Appeal of Brevoort Hotel Co.*, 1 B. T. A. 132, the Board did say:

> "In a proper case, it may well be that although no outlay has been actually made, the commitments and obligations of the taxpayer are such as justly to entitle him to the deduction in accordance with the statute."

The Government cites a number of Regulations to show that the interpretation it places on the statute has had congressional approval by the enactment of subsequent statutes in the same language as the Revenue Act of 1918. That might support an argument that the *subsequent* acts should be interpreted in the light of Regulations 45, but constitutes no basis for interpreting the Revenue Act of 1918 which preceded Regulations 45.

Furthermore the regulations themselves, as shown above, merely refer to *property used in the business*,

and to cost or other basic value, without saying anything about ownership or whole cost.

Several "Office Decisions" are cited to show long continued departmental construction. Examination of them demonstrates that only one, O. D. 1014, 5 Cumulative Bulletin 151, has anything to do with the present question. It contains no reasoning but is an arbitrary statement that depreciation cannot be allowed to the lessee. For all the reasons given in support of our position, it is erroneous. And under the statement published by the Commissioner of Internal Revenue as a preface to every Internal Revenue Bulletin, it is not to be regarded as authority except on its exact facts. Furthermore, we have been advised (by the counsel for the taxpayer in whose case it was written) that it was not enforced in the very case in which it was made, but was reversed by the Committee on Appeals and Review, whose order of reversal, for some undisclosed reason, was never published by the Treasury Department.

Certainly there has been no such long continued and generally accepted departmental construction as to acquire the force and effect of law. *Iselin* v. *U. S.*, 270 U. S. 245, 251.

CONCLUSION

The decision of the Circuit Court of Appeals in this case, 27 Fed. (2nd) 200, is correct and accords with the understanding which businessmen have concerning the elements of cost entering into a business such as that conducted by the lessee under ninety-nine year leases renewable forever, sometimes referred to as perpetual leases, who sublets the buildings on the leased premises to various tenants. His costs include

a. The rent which the lessee under the perpetual leasehold pays to the landlord,

b. The taxes and assessments which he is required to pay,

c. Insurance,

d. Repairs and other expenses in keeping up the property, and

e. The annual depreciation occurring year by year and in spite of repairs, which will ultimately obligate the lessee under the perpetual leasehold to replace the building after it has become depreciated and obsolete.

In anticipation of this replacement, there should be an annual deduction for depreciation from the revenue obtained from the buildings on the leased premises. The amount of this annual depreciation is not income and it should not be taxed as income.

Justice cannot be done to a lessee taxpayer unless he be allowed to deduct the amount of this depreciation before arriving at his taxable income.

Respectfully submitted,

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Attorneys for Respondent.

FILED
MAR 1 1929
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 482.

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE,
C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE,
Petitioners,

vs.

J. HARRY WIENER, *Respondent.*

BRIEF AS AMICI CURIAE.

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February 20, 1929.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF AS AMICI CURIAE

This brief is filed by us as amici curiae, on behalf of The Brevoort Hotel Company, a corporation, of Chicago, Illinois, which corporation is plaintiff in a suit against Mabel G. Reinecke, Collector of Internal Revenue, now pending on appeal in the Circuit Court of Appeals for the Seventh Circuit (No. 4112, October Term, 1928) and involving in large part the question involved in the present case. The Brevoort Hotel Company case was originally before the United

States Board of Tax Appeals and is fully discussed in its reports. See 1 B. T. A. 132.

The Facts.

The basic facts are: The taxpayer during the year 1918 and for some years prior and subsequent thereto, was lessee of certain lots and a building built thereon by its lessor. The useful life of the building was 40 years from the date of the lease and the term of the lease was 99 years. The lease required the lessee to keep on the premises, in good repair and condition, a building, described generally in the lease, the building standing upon the premises at the end of the lease to become the property of the lessor. The rental in the Brevoort Hotel Company case was $60,000 a year for the 99 years. The lessee used the building in the operation of its business.

There is in the Brevoort Hotel Company case an additional fact which is materially different from the present case, and which,we contend, would entitle that company to the allowance even if it be denied your present respondent. That fact is that the Brevoort lease was executed long prior to 1913, and the lessee was in complete possession on March 1, 1913. We shall not discuss that feature in this brief, since it is not in this case.

Question To Be Discussed.

The question to which this brief is addressed is: Was this lessee in the computation of its taxable net income for 1918, for income and profits tax purposes, entitled to deduct from its gross income a reasonable

allowance for the exhaustion, wear, tear and obsolescence of the building referred to?

Statute Involved.

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) provides:

> "Sec. 234 (a) That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions:
>
> * * * * * * * * *
>
> "(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;"

ARGUMENT

The Statute Permits the Allowance to the User of the Property.

Our first argument appears plainly upon the face of the statute. The sole qualification expressed in the statute is that the property covered by the allowance be used in the business. The statute says nothing whatsoever about the ownership of the property. In the present case, the property was used in the business of the lessee, although not actually owned by him. The Government reads into the statute the additional implied requirement that the property must belong to the taxpayer. It would insert the words "belonging to the taxpayer" after the word "property" in the statute. We insist that the statute as written is sufficient and that there is neither reason nor excuse for extending its terms.

If the right to the deduction be conditioned upon the ownership of the property as well as its use in the business, it is clear that no allowance for the exhaustion of leased property would ever be permitted, since the owner is never the user of leased property. This is a result so unjust, unnatural and strained that it should be accepted only upon the plainest demands of the statute. Moreover, it is directly in conflict with the holding of this Court in *Lynch* vs. *Alworth-Stephens Co.*, 267 U. S. 364. If the qualification desired by the Government lie in the alternative to the expressed requirement that the property be "used in the business," the proposal does not assist the solution of the present problem, because we must still decide whether the owner or the user is entitled to the deduction in this particular case. If the Government urges that the owner share with the user to the extent of his interest, then in this case the total allowance would go to the user, since the owner has released the property for its full life, with a provision for the return of its equivalent, and thus has no interest in its exhaustion.

We wish to emphasize at the outset that the single expressed requirement of the statute is the *use* of the property in the business of the taxpayer. All other requirements must be written into the statute.

Practical Considerations Require Allowance to This Lessee.

The taxpayer lessee in the situation outlined above is confronted with a practical problem in dollars and cents, however much the legalists may theorize over his rights and obligations. He has a lease on a piece of land for ninety-nine years. On that land he has a

new building, which his lessor has built but which will last only forty years, less than half the term of the lease. The lessor during the life of the lease will build no more buildings on this land. This lessee must pay his lessor $60,000 a year for the entire ninety-nine years of the lease. Presumably the land will not sub-rent for any such figure; otherwise the lessor would not have included the building in that rental figure. Furthermore, the lease requires the lessee to keep the building in good condition and repair and to return to his lessor whatever building is on the premises at the end of the ninety-nine years. Here then is an economic compulsion upon the lessee to replace the worn-out building at the end of the forty years. The lessee's problems are: How shall he finance the construction of the new building? How shall he figure his real net profits for the first forty years of his lease?

Our contentions are that the Revenue Act permits the allowance for exhaustion, etc., contained in the section above quoted, to that taxpayer whose income is affected by the exhaustion; that the lessee in this case is compelled to build a new building on this land at the end of forty years, which second building is to belong not to the lessee but to the lessor, and thus it is the lessee in this case who must meet the loss occasioned by the exhaustion of the first building; that the lessee must meet this expenditure out of his income and therefore he is entitled to the allowance.

Real profit is the excess of the return over and above every expense and loss incurred to derive the return. One makes no profit if his return merely equals the expenditure he makes, or is obligated to make, to derive the return. His expenditure may be a current outlay for services or material, or a single

disbursement for so-called capital assets consumed or worn out or destroyed in the process of deriving the return. In any event he has no profit until the return exceeds the sums disbursed to derive it. This is the simple and practical way in which the lessee taxpayer in this case must face his problem of profit and finance. For forty years he has an annual gross return from his business, conducted in the building on the leased land; he has his recurring annual rental and his current and continuing expenses; at the beginning of the forty years he had the use of a new building and at the end of the forty years he must outlay the cost of a new building. That new building belongs not to him but to his lessor. Clearly this lessee's real profit for the forty-year period is the gross return less the forty years' rent, the current expenses and the cost of the new building. Unless he makes an allowance for the exhaustion of the building he is simply deluding himself as to the amount of profit from his business. The figure of ostensible profit is absolutely fictitious. He cannot shut his eyes to the enormous expenditure which must necessarily conclude the period. Provision should be made out of gross income to meet that expenditure.

The Rental Arrangement Contemplates Allowance to Lessee.

The obligation upon the lessee to build a new building was, as a business matter, as binding upon him as his obligation to pay rent and was directly related to the rental arrangement. When a lessor computes his rental requirements, he must consider two factors: (1) a return on his money and (2) the maintenance of

his capital intact. Where, as in this case, the lessee is required by the very nature of the transaction to replace the building within the life of the lease, the lessor has by that arrangement insured the maintenance of his capital, and need make no further provision out of income for that purpose. Assume that the value of the building was $800,000 and the life 40 years; the allowance for exhaustion would be, roughly, $20,000 per year. A yearly return to the lessor of 6% upon an $800,000 building would be $48,000. This is true income and he should pay tax upon it as such. If the lessee is to replace the building without cost to the lessor, there is no reason why the lessor should put aside $20,000 of this $48,000 to maintain his capital. Assume that the gross income of the lessee from the operation of the build is $100,000. Of this amount he must pay $48,000 as rent. In addition, he should set aside $20,000 to apply upon the $800,000 which he must pay his lessor, in the form of a new building, at the end of the term of the lease.

The absurd result of the Government's position is that the lessor, who receives a rental of $48,000 a year and is under no necessity of establishing a reserve for replacement, is allowed a deduction (if anyone is to be allowed a deduction) of $20,000 and pays a tax upon only $28,000; whereas the lessee may deduct only the $48,000 paid as rent and must pay a tax upon the $52,000 of his gross income remaining, although his profit for the year is clearly only $32,000. At the end of the forty years the lessee makes a payment of $800,000 to his lessor as part of the consideration for the use of the property but he receives for income tax purposes no deduction whatsoever from that sum. The lessor, on the other hand, has during the forty years

been relieved of tax upon $800,000 of what was purely a 6% return for the use of his capital. These figures given by way of illustration are, of course, wholly fictitious but this is the result urged upon the Court by the Government.

Our contention is that, in the foregoing case, the lessor should be taxed upon his clear profit of $48,000 annually and the lessee upon his clear profit of $32,000. To do otherwise is to do violence to the meaning of the words "net income subject to tax," since it would levy a tax upon the net income of the lessee plus $20,000 no part of which is profit to him, and at the same time relieve from tax $20,000 of the true income of the lessor. We contend that where the lessee is to replace the building, he should receive the allowance for its exhaustion; where the lessor replaces the building he should receive the allowance.

We contend that the burden of the destruction of the building was fixed by the parties in their contract and that the allowance should follow the burden. That was what Congress contemplated when it selected the phrase "*used* in the trade or business" to describe the property covered by the allowance.

This Court Has Approved Allowance to Lessee.

This Court in *Lynch* vs. *Alworth-Stephens Co.*, supra, has considered the principles involved in this controversy. The allowance under discussion in that case was "depletion," but, as the Court said in *U. S.* vs. *Ludey*, 274 U. S. 295, 303, "In essence the deduction for depletion does not differ from the deduction for depreciation." Our whole contention in this case is succinctly stated in a sentence used by the Circuit

Court of Appeals in the *Lynch* vs. *Alworth-Stephens Co.* case (294 Fed. 194), and quoted with agreement by this Court in its opinion in the case (supra, p. 370). That statement was, "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction."

The lessee in the present case has a very real interest in the building and his interest therein is property which was acquired under the contract and which is being exhausted as the life of the building runs out. Under the circumstances of this lease, the value of the lessee's interest is the whole value of the building, since the lease runs longer than the building and its terms compel, even if they do not specifically require, the lessee to make whole the lessor in respect to such exhaustion.

The Government's Theory Stated.

It is in the realm of legalistic controversy rather than in the field of practical results that the Government takes its stand to dispute any allowance to this lessee on account of the admitted exhaustion of the building admittedly used in his business. The statutory allowance, says the Government, is to return to the taxpayer tax-free his capital investment. In *Ostheimer's Appeal*, 1 B. T. A. 18, quoted in *The Brevoort Hotel Company* case, supra, page 135, the Board of Tax Appeals says that this allowance "is based upon the principle of allowing a taxpayer a return of the capital invested in his business before subjecting his earnings therefrom to tax." The Government

reasons that for thirty-nine years, eleven months and twenty-nine days this taxpayer lessee has made no capital investment in this building; therefore, for that period he is to be permitted no allowance; since we have not yet reached the last day of the fortieth year, we are not concerned with what may happen to him on that day, or on the last day of the ninety-ninth year of his lease.

Allowance is to Replace Property Exhausted, Not to Return Capital Investment.

We insist that the Government's theory will not bear critical analysis. The unmodified return-of-capital-investment explanation of this statutory allowance, which is the sole basis for the Government's contention in this case, is incomplete, inaccurate and untenable. In the first place, the statute makes no reference to either "capital" or "investment." The petitioners' entire conception is an insertion of an extraneous theory into the otherwise clear language of the statute. In the next place, the Government's theory seems to treat the allowance as a capital adjustment, whereas the statute is not so constructed. The statute does not *exclude* these amounts from income, as if they were capital. It deducts them from gross income to get *net* income. There is no justification for an unrestricted return of capital *out of* income. There is reason and justification, and even necessity, for a return out of income of property which has been consumed or lost or worn out in the process of deriving the income. Such losses are operating expenses. A building used up in forty years is no different from a ton of coal used up in a week or a kilowatt of electricity consumed

in a minute. In the manufacture of automobiles, factory buildings are worn out; the value thus consumed is part of the cost of the manufacture of the automobiles, just as is the value of the steel, the coal, the electricity and managerial skill which is consumed. In the hotel business, which was the business of the Brevoort Hotel Company, the value of the building is translated into service sold the guests, just as are the values of the stationery, soap, and servants' hire. If capital be consumed or lost or worn out in the winning of the profit, there is excuse and justification for an allowance for its return out of income; if the capital be not so consumed or lost or worn out there is neither excuse nor justification for the allowance. The sum total of the outgo must be reckoned before a figure of profit (*net income*) emerges from the gross returns. On that basis the allowance can be justified but on no other.

Our suggestions in this respect are supported by the views expressed by this Court in *U. S.* vs. *Ludey*, 274 U. S. 295, 300, and in *Von Baumbach* vs. *Sargent Land Co.*, 242 U. S. 503. In the Ludey case the Court said:

> "The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents *the reduction*, during a year, of the capital assets *through wear and tear of the plant used*. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. The theory underlying this allowance for depreciation is that *by using up* the plant, a gradual

sale is made of it. The depreciation charged is the measure of the cost of the part which is sold."

In the Von Baumbach case (p. 524) the Court referred to depreciation as "*the annual losses* for wear and tear and obsolescence of structures, machinery, any personalty in use in the business."

If the allowance be solely for the purpose of returning capital investments, numerous complications immediately appear. 1. Under that theory land, stock and bonds would seem to be depreciable. 2. Under that theory no justification appears for spreading the allowance evenly over a term of years, as is the custom. It would seem proper to return *all* the investment before *any* income appears. 3. The proper deduction would be a constitutional question, since Congress must of necessity exclude all capital from this tax. 4. No depreciation could be taken in the computation of a net loss for a year, since no capital can be returned out of a deficit. 5. No depreciation would be allowable upon property acquired by gift or devise since such property represents no investment. 6. The 1909 corporation Tax Act (c. 6, Sec. 38, 36 Stat. 11) and the 1913 Income Tax Act (c. 16, 38 Stat. 114) would both be erroneous in their treatment of the deduction, since they include it in "losses actually sustained during the year." (See Section Third (fifth) of the 1909 Act and Section G (6) (second) of the 1913 Act).

None of these difficulties appear if the purpose of the allowance be considered to be the return of the value of assets consumed or destroyed in the derivation of income allowed to those interested in the prop-

erty to the extent of their several economic losses through such consumption or destruction.

Perhaps the most complete discussion of depreciation is to be found in the report of the Interstate Commerce Commission on the subject (118 I. C. C. 295) which study was made pursuant to an act of Congress. The position we suggest as to the real nature of the depreciation allowance is supported in that report.

Title to Property Does Not Control Allowance.

Following out its general theory of the nature of the allowance, the Government necessarily insists upon the presence in the taxpayer of the legal title to the property. The Board of Tax Appeals in the *Brevoort Hotel Company* case, supra, conceded the pertinence of our suggestions as made above, but insisted that the pivotal question was "*whose* assets are consumed?" and answered the question by holding that they must be the taxpayer's assets. This is a subtle suggestion, but fallacious. It underlies the whole opinion of the Board of Tax Appeals in the *Brevoort Hotel Company* case, supra. The major premise from which the Board and the Government reason is that the exhaustion, etc., of all property falls upon the owner. The fallacy is the fallacy inherent in syllogistic reasoning; the major premise is so broad as to assume the quod erat demonstrandum. The exhaustion of all property does not fall upon the owner; sometimes it falls upon some one else. In the Brevoort Hotel Company case, supra, the Board of Tax Appeals says: "If in his business A consumes the coal of B, he has no deductible fuel cost; and if he exhausts B's building it adds nothing to *his* cost of operation." But plainly if A makes an agreement with B to replace or to pay

for at the end of a term, all of B's coal consumed by A during the period, A has a deductible fuel cost as he burns the coal (assuming that he is upon an accrual basis as all these taxpayers are). Similarly with respect to B's building, which is this present case.

Past Investment Not Necessary to Allowance.

The Government greatly overemphasizes the "investment" feature of its theory. That, in our view, is a non-essential. An obligation to pay is as effective a reduction of profit as is an actual disbursement, so long as the obligation arises in the derivation of the income. As this building was consumed by use the lessee concurrently incurred an obligation equal to the consumed portion of the building. His balance between receipts and obligations was precisely the same as it would have been if he had owned the building and instead of incurred obligations had on his books a reserve for capital consumed.

The Government insists upon a *past* capital investment as a predicate to the allowance. Similar sophistry would prohibit to a stock trader selling "short," the tax-free return of his costs. We contend that the time of the investment or expenditure is totally immaterial, so long as it is a necessary outlay to the winning of the profit. The computation of profit is not necessarily chronological; cause and result are the criteria of its factors.

Perhaps the "short" stock sale is the most vivid simile to the present situation. If, as this Court said in *U. S.* vs. *Ludey*, supra, the theory underlying depreciation is that "a gradual sale" is being made of the property, then in the present case a gradual "short"

sale is being made. As we have suggested above, there is no difference, for income tax purposes, between a "short" sale and an ordinary one. In either case the profit is the difference between receipts and costs. Whether the taxpayer buys first or sells first is utterly immaterial. So in regard to depreciation ("a gradual sale") it is utterly immaterial whether the taxpayer first acquires assets and then consumes them, or whether he first consumes and then pays for them.

Difficulties Encountered by Government.

In the past the effort of the Commissioner of Internal Revenue to apply consistently his theory, including the insistence on both ownership and possession, has caused him to take positions in various situations which were so incongruous as obviously to necessitate judicial correction. These include, (a) the refusal of depreciation on leasehold interests acquired prior to March 1, 1913 (I-2 Internal Revenue Cumulative Bulletin 90), a position which practically amounted to the denial that a leasehold estate was property which was corrected by the decision of *Atterbury* v. *Commissioner*, 1 B. T. A. 169; (b) a denial of depreciation to life tenants (I-1 Internal Revenue Cumulative Bulletin 172) which was corrected by *Grant* v. *Rose*, 24 Fed. 2nd 115; (c) a refusal of a deduction for depletion to the lessee of a mineral lease (Regulations 33, p. 527, 528) corrected both by statute as applied to later years and by *Lynch* v. *Alworth-Stephens Co.*, supra; (d) in one case the owner had absolutely eliminated any effect of depreciation on his property value by leasing for a ten year period under a lease containing a bind-

ing contract on the lessee's part to purchase within that period. The Commissioner claimed that, since the property had depreciated during the ten years, the owner by then obtaining the price determined at the beginning of the ten year period had increased his profit by an amount equal to the depreciation during those ten years (See *Schoellkopf* v. *Commissioner*, 4 B. T. A. 1032). Obviously this position was an argumentum ad absurdum of the capital investment theory.

CONCLUSION

We contend that the gist of the statutory allowance is the destruction or consumption of the assets and not merely the return of a capital investment. We therefore contend that the taxpayer to whom the allowance is made is the one who must make good the assets destroyed and is not merely the person who owned them.

In short, the controversy is this: The Government insists that the allowance must be predicated upon a prior capital investment, whereas we contend that the allowance is purposed to restore him upon whom the loss from the exhaustion of the property falls by reason of its use in the business. We submit that the practical features of the situation, sound economics, sound finance and the conclusions of this Court in *U. S.* vs. *Ludey*, supra, and in *Lynch* vs. *Alworth-Stephens Co.*, supra, support our views. Especially do we urge that the plain language of the statute supports our view and no reason appears for grafting additional qualifications upon those laid down by Con-

gress. The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Washington, D. C.,
February 20, 1929.

SUPREME COURT OF THE UNITED STATES.

Nos. 482 and 483.—October Term, 1928.

Harry H. Weiss, Collector of Internal Revenue, Petitioner, 482 *vs.* J. Harry Wiener. C. F. Routzahn, Collector of Internal Revenue, Petitioner, 483 *vs.* J. Harry Wiener.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1929.]

Mr. Justice Holmes delivered the opinion of the Court.

These are suits brought by Wiener, the respondent, to recover amounts that he says should have been allowed as deductions from his income taxes but that were disallowed. The petitioners, the defendants, prevailed in the District Court, 17 F. (2d) 650; but the judgment was reversed by the Circuit Court of Appeals, 27 F. (2d) 200, and a writ of certiorari was granted by this Court.

Wiener was in the business of taking long leases of property and subletting. He held thirteen leases for ninety-nine years, renewable forever. He claimed the right to make an annual deduction from his income tax for estimated depreciation of the buildings, relying upon § 214 (a) (8) of the taxing act; Revenue Act of 1918, c. 18; 40 Stat. 1057, 1066, 1067; which granted deduction of "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." He was allowed all sums paid for repairs but nothing for the estimated obsolescence for which he had not paid. It may be taken for the purposes of decision that Wiener undertook to keep the buildings up to their present condition, to pay rent even if the buildings were destroyed and that his obligations were sanctioned by a liability to forfeiture. It is argued with

much elaboration that not only covenants but economic necessity required the respondent to keep the buildings up to the mark and that the amount needed for this purpose should be allowed.

The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value unless realized in money by a sale. *United States* v. *S. S. White Dental Co.*, 274 U. S. 398, 401. A stockholder does not pay for accumulated profits of his corporation unless he receives a dividend. That is the general principle upon which these laws go. It is true that they allow for obsolescence of buildings, &c., where the loss is of materials not of money, but there as elsewhere the loss must be actual and present, not merely contemplated as more or less sure to occur in the future. If the taxpayer owns the property the loss actually has taken place. But with Wiener it had not, and it might never fall on him, as was pointed out by the District Judge. Some of the leases were assigned and others surrendered to the lessor. In such cases it would be a mere speculation to suppose that depreciation was taken into account in the transactions. Probably other and dominent considerations induced the acts. The event showed that in those cases there was no true basis for Wiener's claim.

The Circuit Court of Appeals interpreting *United States* v. *Ludey*, 274 U. S. 295, said that the purpose of the revenue act is to tax only gain, and that the amount thus allowed to be set aside is not gain, but is capital that has gone into gross income. But it is very clear that as yet the capital of the lessee has not gone into it, and upon the considerations just mentioned it is not enough that he has made a contract that very possibly may not be carried out to replace that capital at some future time. If, as we think, such a contract is not enough to cause the lessee a present loss by wear and tear, the fact, which may be assumed, that the property was used by him in his business, does not matter. Of course he must show an interest in the property and a present loss to him to make the statute apply.

In *Lynch* v. *Alworth-Stephens Company*, 267 U. S. 364, a statutory provision for deducting from gross income a reasonable allowance for depletions of mines was held applicable to a lessee bound

to mine a minimum tonnage and to pay a stated royalty. In such a case the whole value of the lease is in the right to remove the ore, that is to destroy as rapidly as may be the real object of the lease. But in the case of a house or shop the value is not in the right to destroy and the destruction is only an undesired, gradual and subordinate incident of the use. The diminution in the value of a mine to the lessee is conspicuous, necessary, and intended, and is the very source of the gross income of the lessee from which it is deducted, whereas the wear and tear of a house or shop in any given year may be only recognizable by theory and, as has happened in this case, may cost the lessee nothing while the premises are in his hands.

It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time and we are of opinion that it should not be disturbed.

Judgment of Circuit Court of Appeals reversed.
Judgment of District Court Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.